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A

TREATISE

ON THE LAW OF

VENDORS and PURCHASERS

OF

Personal Property.

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TREATISE

ON THE LAW OF

VENDORS and PURCHASERS

OF

Personal Property;

Considered chiefly with a View to

MERCANTILE TRANSACTIONS.

BY GEORGE ROSS, ESQUIRE,
OF THE INNER TEMPLE.

Ὥςε ἀκύρων γιγνομένων (τῶν συνθηκῶν) ἀναιρεῖται ἡ πρὸς ἀλλήλες χρεία τῶν ἀνθρώπων.

ARIST. RHET.

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TO THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

Lord Chief Justice, *&c. &c. &c.*

My Lord,

I have presumed to dedicate to your Lordship the following Treatise, which is an attempt to collect and methodise the cases which have been decided upon a most important branch of the commercial law.

The subject has received such powerful and lucid illustration from your Lordship, that it was impossible to rise from the investigation of it without an increased veneration for those qualities, which so eminently distinguish your Lordship's judicial decisions: qualities which need no better panegyric than the Term Reports.

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Accept, my Lord, my warmest thanks for the permission, which you have so kindly accorded me, to prefix your respected name to this work; a permission, to me, most gratifying, as it has afforded me an opportunity, thus publickly, to express those sentiments of profound respect and admiration, with which I have the honour to subscribe myself,

My Lord,
your Lordship's
most obliged, and
very humble servant,

GEORGE ROSS.

Inner Temple,
July 20th, 1811.

PREFACE.

WHETHER the numerous publications on the various branches of the Law of England, which have of late years been submitted to the public, be, or be not, a real benefit to the profession, is a question upon which much difference of opinion has prevailed. It is contended (and certainly with some appearance of plausibility) that the desultory reading of unconnected treatises on legal subjects, from which a sort of practical knowledge may be prematurely obtained, has an obvious tendency to disincline the student to that "tedious and lonely process of extracting the "theory of law from a mass of undigested learning" by which alone he can hope to acquire those elements and first principles, which are the only solid foundation upon which to build the fair fabric of professional eminence; and that (as the elegant commentator upon our laws has said, upon another occasion) "being uninstructed in the prin- "ciple upon which the rule of practice is founded, "the least variation from established precedents "will totally distract and bewilder him: *ita lex* "*scripta est* is the utmost his knowledge will arrive "at; he must never aspire to form, and seldom "expect to comprehend, any arguments drawn *a* "*priori*, from the spirit of the laws and the na-

"tural

" tural foundations of justice (*a*)."—If, indeed, such were the necessary effects of the class of works alluded to, they would be deservedly reprobated; but if we consider them as mere digests of that ancient lore whose, almost chaotic, confusion is so appalling to the novice, and which " marshal him the way that he should go" in his more recondite researches, we must pause before we give our assent to that sort of reasoning which supposes that the student who sets out in his career, so guided will necessarily miss the goal, or that he will be so captivated with the blond beauties of a modern margin that he will never dive into the sombre regions of black letter, where, cob-web bound, the truths of law lie hid.

Without, however, presuming to give any decided opinion upon this question, this much I will say—that if there be any who, having skimmed the surface of the legal science, stop short in their course of study;—such, I am inclined to think, without the aid of those proscribed treatises, would never have acquired, even that superficial knowledge, which may perhaps be sufficient to qualify them for the more ordinary business of the bar.—But whatever weight the objection I have stated may have, when applied to treatises upon the more abstruse branches of the law, I apprehend

(*a*) Blac. Com. v. 1. p. 32.

it

it cannot be urged with much force against works of a mere practical nature, whose object is, not so much to benefit the student, as to assist the practising lawyer, and direct the merchant in the formation of his contracts:—at any rate I shall assume the demand for works of this nature as the best evidence of their utility.

Taking it then for granted, that it is no trifling assistance to the lawyer, to have the law upon any subject of frequent recurrence digested into such a form that he can readily refer to it in the hurry of business; it appears rather remarkable that, whilst there is scarcely a title in our laws which has not been made the subject of a distinct work, the law which regulates the transfer of all the commercial wealth in the country should hitherto have remained unnoticed. As the contract of sale is perhaps, as productive of litigation as any one transaction that comes under the review of the courts of law, a compendium of the law upon that subject seemed to be a desideratum:—I conceived therefore that I should be employing my leisure hours advantageously to myself, and, I trust, not without some benefit to the profession of which I have the honour to be a member, in collecting and arranging the law on this most important subject. In the execution of this undertaking, I have endeavoured to draw from every source, ancient and modern, what-

ever appeared to me to elucidate the contract under consideration; but, notwithstanding my utmost vigilance, I am far from presuming to think that much valuable information may not have escaped me.—Whenever I have observed a striking coincidence between the law of England and the Civil law I have noted it, and not unfrequently cited passages from the Institutes, Digest, &c. by way of illustration, or to mark the origin whence our own law has been derived.

The arrangement of the subject, which I have adopted, will be best explained by the Analytical Index; but to compensate for any deficiency of arrangement, and to facilitate the reader's search for any particular point (upon which facility the value of a work of this nature must greatly depend) I have added a copious index of the principal matters, in which are included the points determined by the cases printed in the Appendix.

I am afraid that I shall be thought, by many, to have cited the cases rather more at length than was necessary; but my apology for that is, that in a work not written exclusively for the professional reader, it was a principal object to make it as perfect as possible within itself; and my object of general utility would be, in a great measure defeated, were it necessary to refer to the reports to form a correct apprehension of the

the cases:—though the adoption of this plan may have, in a slight degree, increased the bulk of the book, it may not be altogether useless, even to the professional reader, on the circuit, or where the reports may not be at hand.

It is an observation which will not fail to have suggested itself to every one who has attentively observed the proceedings of our courts of justice, that by far the greater part of the lawsuits which have their rise in mercantile transactions, originate, not so much in a want of candour and good faith amongst our merchants, as in a misconception or ignorance of the law which regulates even the most common contracts; the perpetual recurrence of which, and the hurry in which they are entered into, frequently preclude the parties from having recourse to professional advice.—If my humble endeavours shall be found in any degree to remedy this radical mischief, and to diffuse a more general knowledge of the law of Sales, and thereby lessen that litigation which is so contrary to the characteristic spirit of a British Merchant, that most gratifying of all feelings, an honest pride of having served the cause of truth and justice, will greatly overpay me for the labour I have bestowed on the work which I now submit to the judgment of my own profession and the mercantile world.—I may in truth say with our master Coke, "*ex*

" *quibus laboribus si quidem respub. emolumentum,*
" *lector studiorum suorum condignum fructum per-*
" *ceperit, existimabo me elucubrationúm mearum*
" *amplum sanè præmium consequutum* (*b*).

G. R.

4, *Inner Temple Lane,*
July 20, 1811.

(*b*) Pref. to the 3rd. Rep.

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A TREATISE

A

TREATISE

ON

THE LAW OF

VENDORS AND PURCHASERS, &c.

CHAP. I.

OF SALES IN GENERAL.

A SALE may be defined to be, "a transmutation of "property from one man to another, in consideration "of some price or recompence in value (*a*)." Hence it appears that this contract belongs to that class of contracts which the civil law calls Do, UT DES (*b*). It is a transmutation of property; for upon all sales of goods in possession, the property is changed immediately upon the making of the contract (*c*); although the actual possession may not be obtained by the vendee until the fulfilment of the stipulated terms (*d*); thus, if a man sell his horse for money, though he may keep him until he is paid, yet the property of the horse is by the bargain in the bargainor or buyer; so that if he presently tender the money to the seller and he refuse it, he may take the horse, or have an action of detainment. And if the horse die in the vendor's stable between the bargain and delivery, still he may have an action of debt for the mo-

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(*a*) 2 Blac. Com. 446.
(*b*) Ff. l. 19. tit. 5, 5.
(*c*) Comyn's Dig. tit. Biens, D. 3.
(*d*) Perk. § 92.

CHAP. I. ney, because by the bargain the property was in the buyer (*e*.) But when there is no actual change of possession, it is necessary, in order to render the bargain binding, that something should be paid down ~~or tendered~~ to the vendor at the time of making the bargain, by way of earnest; as if the bargain be that one man shall give ten pounds for the horse of another, and give one penny in earnest, which is accepted, this is a perfect bargain, and they shall have mutual remedies for the recovery, the one of the horse, and the other of the price (*f*); so if a man say the price of his cow is four pounds, and another says he will give him four pounds, but does not pay it presently, he may not have her afterwards except the owner will, for it is no contract. But if the purchaser presently go to telling his money, if the owner sell the cow to another, the vendee shall have his action on the case against the vendor (*g*). So that where either the thing sold is delivered or tendered, or the price, or part of it paid or tendered, the property of the goods is bound by the bargain; and this was the law in very early times, as we learn from Glanville, who, speaking of sales, says, "*Perficitur autem emptio et* "*venditio cum affectu, ex quo de pretio inter contra-*" *hentes convenit; ita tamen quod secuta fuerit rei* "*emptæ et venditæ traditio, vel quod pretium fuerit* "*solutum totum sive pars, vel saltem quod arrhæ inde* "*fuerint datæ et receptæ* (*h*)*:*" and Bracton looks upon the payment of earnest as evidence of the bargain— "*Emptio vero et venditio contrahitur cum de pretio*

(*e*) Noy's Max. c. 42. recognised in Hinde v. Whitehouse, 7 East. 571.

(*f*) Bracton, l. 2. c. 27.—Noy's Max. c. 42.—Kitch. 181. a.—Bach v. Owen, 5. T. R. 409.

(*g*) Kitch. 181. a.—14. H. 8. 20 a.—Noy's Max. c. 42. Shep. Touch. 225.

(*h*) l. 10. c. 14.

"*convenerit*

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" *convenerit inter contrahentes, dum tamen a venditore* " *arrarum nomine aliquid receptum fuerit, quia quod* " *arrarum nomine datum est, argumentum est emp-* " *tionis et venditionis contractæ* (*i*)." In this our law coincides with the civil law (*k*). But although the property is bound by the bargain, yet where only a part of the money is paid by way of earnest, the property does not seem to be *absolutely* bound; for if the party giving earnest afterwards neglect to complete his contract within a reasonable time after request made to him for that purpose, the bargain is dissolved; otherwise this manifest injustice would ensue, that a man by paying a penny earnest might become entitled to take the goods of another, who would be driven to his action to recover the price. And in the case put by Noy, where it is said that on payment of earnest the bargain is perfect, and the parties shall have mutual remedies, &c. he must be understood with this restriction, that the party demanding the horse, tenders at the same time the price (*l*). The law on this subject is clearly stated by Lord Holt, in Langfort v. the administratrix of Tyler (*m*). His Lordship there lays down the following rules; "That " notwithstanding the earnest, the money must be paid " upon fetching away the goods, where no other time " for payment is appointed. That earnest only binds " the bargain, and gives the party a right to demand, " but then a demand without the payment of the mo- " ney is void. That after earnest given, the vendor " cannot sell the goods to another without a default in " the vendee; and therefore if the vendee does not " come and pay and take away the goods, the vendor

(*i*) l. 2. c. 27. Hob. 41.—10 Edw. 4. 10.
(*k*) Inst. l. 3. tit. 24. (*m*) 1 Salk. 113.
(*l*) Cowper *v.* Andrews,

CHAP. I. "ought to go and request him, and then if he does not "come and pay and take away the goods in convenient "time, the agreement is dissolved, and he is at liberty "to sell them to any other person." It will be observed, that Lord Holt says, "when no other time for "payment is appointed;" for if the parties enter into any special contract or agreement (as in sales of any magnitude is now usually done) these rules of course will not apply, "*quippe generaliter verum est quod con-*"*ventio legem vincit.*" Upon these grounds, and with these restrictions, a sale may be defined, *a transmutation of property.*

It is also a transmutation of property in consideration of some price or recompence in value; for in all bargains, sales, contracts, promises, and agreements there must be a *quid pro quo* presently, except day be given for the payment (*n*). This recompense in value, in the contract of *sale*, is always in money; for if it be a commutation of goods for goods, it is more properly an *exchange* (*o*). It is then, a transfer of goods for money, which is strictly a sale. Puffendorf explains buying and selling to be, a contract whereby the property of a thing or some right equivalent to it is acquired for a certain sum of *money* (*p*). So too, the civil law. "*Item pretium* "*numerata pecunia consistere debet* (*q*)."

The practice of buying and selling seems to have been substituted in very early times for the primitive method of commutation by barter, though the latter method is still practised in many barbarous nations, where the use of money, as a common medium, is unknown. One of

(*n*) 17 Edw. 4. 2.—Co. Lit. 47. b.—Dyer, 336. b. (34.)—Noy's Max. c. 42.

(*o*) 2 Blac. Com. 446.

(*p*) J. N. l. 5. c. 6. § 2.

(*q*) Inst. l. 3. tit. 24.—And see also Ff. l. 15. tit. 1.

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the most early sales we meet with in history is related in the book of Genesis, on the transfer of the field of Machpelah from Ephron the Hittite to Abraham, where it is said that Ephron agreed to give the field, and Abraham to give *money* for it. Ephron then declared the price to be four hundred shekels of silver, "and Abraham "weighed to Ephron the silver which he had named, in "the audience of the sons of Heth, four hundred shekels "of silver current money with the merchant (*r*)." We have another instance of a sale in the same sacred book; the sale of corn in Egypt to the brethren of Joseph; where we are told that "Joseph commanded to fill their "sacks with corn, and to restore every man's money in "his sack (*s*)." We might also refer to the sale of Joseph to the Ishmeelites for twenty pieces of silver, as a further proof of the antiquity of sales for money.

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Having thus amplified the definition with which we set out, and shortly adverted to those requisites to the perfection of the contract of sale, which subsisted at common law; it will now be necessary to point out the additional, or rather alternative, requisites which have been imposed by statute.

As man, in a state of society is obnoxious to many wants, real, or ideal, which his own individual exertions would be insufficient to supply, the interest of mankind at large has suggested that communication of benefits which enables each to contribute to the comforts of all, through the medium of contracts. As much therefore of the happiness of its subjects must necessarily depend upon the strict observance of such contracts, it becomes one of the first, and most important duties of a good government, to provide by law for their due perform-

(*r*) Genesis, c. 23, v. 11. et seq. (*s*) Ibid. c. 24.

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ance: accordingly we find that in almost all nations certain formalities have been established, as necessary to the creation of a binding contract between man and man, in order to give to it that notoriety which is the most effectual mean of insuring its due performance: thus, amongst the Jews, "it was the manner to "confirm all things for a man to pluck off his shoe, and "give it to his neighbour; and this was a testimony in "Israel (*t*)." And in this manner we read of the contract of sale between Boaz and Elimelech being testified (*u*). Stiernhook (*x*) informs us, that amongst the ruder nations of the north, the more simple custom of shaking hands was the only ceremony in use to confirm a bargain. But though these ceremonies, or the giving of earnest, might be found quite sufficient in those early times, for the evidencing of bargains, we invariably find that where civilization has made any progress, and brought with it its attendant wants, which would naturally induce a more extensive commercial intercourse, some more permanent and authentic record of contracts of sale, than the mere memory of by-standers, has been thought necessary. Hence in more modern times we find that contracts of this nature were frequently reduced to writing. This practice is recognised both by the Roman law (*y*), and by the law of England (*z*), particularly since the passing of the statute 29 Car. II. c. 3. (commonly called the statute of frauds); which statute is supposed to have been penned by that distinguished judge Sir Matthew Hale, with the assistance of some of

(*t*) Ruth, c. 4. v. 7.
(*u*) Ibid. v. 8 and 9.
(*x*) De Jure. Goth. b. 2. c. 5.
(*y*) Inst. l. 3. tit. 24.—Ff. l. 22. tit. 4.
(*z*) Bracton, l. 2. c. 27.

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n *v.* Rogers. 1

"He (Lord Keeper Guilford) had a great hand in the statute of frauds and perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But, at that time, the Lord Chief Justice Hales had the preeminence, and was chief in the fixing that law; although the urging part lay upon him, and I have reason to think it had the first spring from his lordship's motion. For I find in some notes of his, and hints of amendments in the law, every one of those points ~~take notice of~~ which were there taken care of, and diverse other matters, which he set his mark upon have since been regulated by acts of parliament express."

Hon. Roger North.

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(*a*) In *Wyndham* v. *Chetwynd*. 1 *Bla*. 97. 1 *Burr*. 418, S. C.

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CHAP. I.

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(*t*) Ruth, c. 4. v. 7.
(*u*) Ibid. v. 8 and 9.
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(*y*) Inst. l. 3. tit. 24.—Ff. l. 22. tit. 4.
(*z*) Bracton, l. 2. c. 27.

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the most eminent lawyers of his time (*a*)*; but by whatever hand the salutary statute was drawn, the beneficial effects which it has produced, justly entitle it to the emphatic elogy pronounced upon it by the late learned Chief Justice of the Court of King's Bench, who called it "one of the wisest laws in our statute book (*b*)."

This statute, which is stated to be made "for the "prevention of many fraudulent practices, which are "commonly endeavoured to be upheld by perjury, "and subornation of perjury," enacts, "That no con- "tract for the sale of any goods, wares, and mer- "chandizes for the price of ten pounds or upwards, "shall be good, except the buyer shall accept part of "the goods so sold, and actually receive the same; or "give something in earnest to bind the bargain, or in "part of payment; or that some note or memorandum "in writing, of the said bargain, be made and signed "by the parties to be charged by such contract, or "their agents thereunto lawfully authorised (*c*)."

(*a*) North's Life of Lord Keeper Guilford, 109.—Lord Ellenborough in Wain *v.* Warlters. 5 East. 17.

(*b*) In Chaplin *v.* Rogers. 1 East. 194.

(*c*) § 17.

* Lord Mansfield (*a*) however, with some appearance of plausibility, expressed his doubts of the generally received opinion, that the statute of frauds was prepared by Lord Hale, his lordship having died in 1676 (28 Car. 2.): but how specious soever this reason may appear, upon a cursory view of the matter, it will weigh but little against the authority of Roger North, backed as he is by traditional evidence, when it is recollected that Lord Hale died in the latter end of the year 1676 (on the 26th of December), and that parliament did not meet till the 15th of February in the following year, two months after which this act was passed. It is therefore more than probable that the bill was drawn in his lordship's lifetime: an act of such vast importance would doubtless be in preparation a considerable time previous to its being presented to parliament.

(*a*) In *Wyndham* v. *Chetwynd*. 1 *Bla.* 97. 1 *Burr.* 418. S. C.

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In the elucidation of this branch of the statute, the first inquiry which presents itself is, what contracts for the sale of goods, &c. are within the meaning of the act? Upon this point it has been determined that the words "*no* contract, &c." extend to executory contracts, as well as to such as are to be completed immediately, *i. e.* where the contract is merely for the sale of goods, &c. *having a present existence in the shape in which they are to be delivered, at the time of making the bargain:* such contracts therefore are void unless the requisites of the statute are complied with. Thus:—

A. and B. (*d*) entered into a verbal agreement for the sale of goods for more than ten pounds, to be delivered at a future time: no earnest was paid, nor was any part of the goods delivered, or any note or memorandum in writing signed. The court were of opinion that this contract was within the statute, and consequently void.

So, where the defendant at Nottingham (*e*) sold to the plaintiff, by sample, fifty quarters of wheat, at four guineas per quarter, to be delivered to the defendant at Gainsborough. Two days afterwards the defendant delivered to the plaintiff, at Nottingham, the sample by which he had sold the wheat to him: *but such sample was no part of the fifty quarters to be delivered at Gainsborough.* No money was paid by the plaintiff to the defendant on account of the wheat; nor was there any memorandum in writing signed by the parties. This contract was held to be void by the statute; and Lord Kenyon, Chief Justice, in delivering his opinion, said, that "after this question had been afloat so long in the "courts, he was glad that by the very able decision of "the court of Common Pleas in the case of Rondeau *v.*

(*d*) Rondeau *v.* Wyatt. 2 H. Bl. 63. 3 Brs. Ch. Cases 154. S. C.

(*e*) Cooper *v.* Elston. 7 T. R. 14.

Wyatt,

" Wyatt the construction of this clause in the statute of " frauds was brought back to the manifest intention of " the legislature in making that provision."

Also where it appeared that the plaintiff (*f*) had verbally agreed to buy certain sheep of the defendant at Lewes fair, and to take them away at a certain hour, but no money was paid, nor any sheep delivered—the plaintiff not coming at the appointed time, nor sending to take the sheep, the defendant sold them to another person. The court held, that the statute of frauds prevented any property from vesting in the plaintiff, there being neither earnest, delivery, nor agreement in writing. But Wilson, J. observed, that where a sale is not immediate, it is not within the statute of frauds, an opinion which he adhered to, though contrary to the opinion of the rest of the court, in the before-mentioned case of Rondeau *v.* Wyatt (*g*)

Overruled

But where the contract is for the sale of that which has only a prospective existence, in the specific shape contracted for, and is not *in esse* and capable of an immediate delivery at the time of the bargain, the case is out of the statute, as may be seen by the following decisions.

The defendant bespoke a chariot (*h*), and when it was made, refused to take it: and in an action for the value, it was objected, that they should prove something given in earnest, or a note in writing, since there was no delivery of any part of the goods. But Pratt, C. J. ruled that this was not a case within the statute of frauds, which relates only to contracts for the actual sale of goods, *where the buyer is immediately answerable, without time given him by special agreement, and the seller is to deliver the goods immediately.*

Opinion over

(*f*) Alexander *v.* Comber. 1 H. Bl. 20.

(*g*) See 2 H. Bl. 66. note (*a*).

(*h*) Towers *v.* Sir John Osborne. 1 Stra. 506.

Upon

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Upon this case it ought to be observed, that the latter part of the decision must be understood as explained by the case of Cooper *v.* Elston (*i*), where Grose, J. says, "The case of Towers *v.* Osborne, went upon the general "principle, that executory contracts were not within "the meaning of the statute. If by that were meant "contracts for the *sale of goods* to be executed on a "future day, such a construction would be a repeal of "the act; but if it only meant such contracts as were "incapable of being executed at the time, then the "decision was right:" and Lawrence, J. in the same case says, "The case of Towers *v.* Osborne, when truly "considered, was not a contract for the purchase of "goods, but for the making of something which had no "existence at the time."—This distinction is farther enforced by Lord Loughborough in pronouncing the judgement of the court in Rondeau *v.* Wyatt (*k*); his lordship's observation is, that, "The case of Towers *v.* Sir "John Osborne was clearly out of the statute, *not be*"*cause it was an executory contract*, but because it "was for work and labour to be done, and materials "and other necessary things to be found, which is dif"ferent from a mere contract of sale, to which species "of contract alone the statute is applicable."

The defendant agreed (*l*) to deliver one load and a half of wheat to the plaintiff, within three weeks or a month from the said agreement, at the rate of twelve guineas a load, to be paid on delivery: which wheat was understood by both parties, to be at that time unthrashed. No part of the said wheat was delivered, nor any money paid by way of earnest for the same; nor any memorandum

(*i*) 7 T. R. 14.
(*k*) 2 H. Bl. 63.
(*l*) Clayton *v.* Andrews, 4 Burr. 2101.

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made in writing. This contract was held not to be within the statute; and it was observed by Yates, J. "That "the wheat was unthrashed at the time when the con- "tract was made, therefore it *could not be delivered at* "*that time.*"—It was not capable of delivery as wheat. CHAP. I.

As to the subject matter of contracts within the provision of this clause; it has been determined, that it relates only to goods, wares, and merchandizes *in esse*, and capable of delivery at the time at which the bargain was made (*m*), with reference to which time the subject matter must be taken (*n*), and therefore a crop of grass being at the time of the bargain for the sale of it, an unsevered portion of the freehold, cannot be considered as goods, wares, and merchandizes, so as to bring a contract for the sale thereof, within this section of the statute of frauds (*o*).

The next consideration in the construction of this clause is, what is a sufficient acceptance by the buyer of part of the goods sold? It would seem that an *actual* delivery by the seller, and acceptance by the buyer, is not necessary in all cases, as where the goods are ponderous, and incapable of being handed over from one to another, a symbolical delivery, such as delivery of the key of a warehouse in which the goods are lodged, or the like, is sufficient to satisfy the statute (*p*).

So also a constructive delivery may arise from the terms of the contract itself, without any distinct substantive act of the buyer, as where the plaintiff, who kept a livery

(*m*) Towers *v.* Osborne. 1 Str. 506.—Clayton *v.* Andrews. 4 Burr. 2101.

(*n*) Lord Ellenborough in Crosby *v.* Wardsworth, 6 East. 610.—See also Waddington *v.* Bristow. 2 Bos. and Pull. 452.

(*o*) Crosby *v.* Wardsworth, supra—Emmerson *v.* Heelis, 2 Taunt. 38.

(*p*) Chaplin *v.* Rogers, 1 East. 194.

stable

CHAP. I. stable, and dealt in horses, being in treaty with the defendant for the sale of two horses, demanded one hundred and eighty guineas for them, the defendant offered a less price, which was rejected: at length he sent word that "the horses were his, but that as he had neither "servant nor stable, the plaintiff must keep them at "livery for him." The plaintiff upon this, removed them *out of his sale stable into another stable* *. It was objected that this was not such a constructive delivery as would avail, to take the case out of the statute. But the court held the delivery to be sufficient, and the plaintiff recovered the price of the horses in action for goods sold and delivered (*q*).

The delivery of an order to a wharfinger, or warehouseman, in whose custody the goods are, to deliver them to to the vendee, is sufficient to satisfy the statute (*r*), and that whether a transfer is in consequence made in the wharfinger's books or not (*s*).

So it seems if the goods remain in the hands of the vendor, and he receives warehouse-rent for them, this is tantamount to a delivery to the purchaser.

Thus (*t*): the defendants, who are warehousemen, sold a quantity of oil then lying in their warehouses to J. S. to be paid for by his acceptance at six months. J. S. having given his acceptance accordingly, on the 1st of August following, sold the oil to the plaintiff, who purchased it *bona fide*, and paid for it at the rate agreed on.

(*q*) Elmore, *v.* Stone, 1 Taunt. 458.

(*r*) Searle *v.* Keeves, 2 Esp. N. P. C. 598.

(*s*) Harman *v.* Anderson, 2 Campbell, N. P. C. 245.

(*t*) Hurry *v.* Mangles, 1 Camp. N. P. C. 452.

* The fact of this being removed from one stable to another made no difference, *per* Sir J. Mansfield, C. J.

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The oil, which still remained in the defendant's possession, was demanded of them by the plaintiff about the end of October, when they said that J. S. had become insolvent before his acceptance was due, and that they would not deliver up the oil until they were paid for it. Their clerk denied that they had ever transferred the oil in their books to the account of J. S.: but it appeared that they had received warehouse-rent from him for its remaining in their warehouse after the period when it ought to have been taken away according to the terms of the sale. It was ruled by Lord Ellenborough, C. J. *That the acceptance of warehouse rent was a complete transfer of the goods to the purchaser.* "If I pay", (said his Lordship) "for part of a warehouse, so much of it is mine."—"This is an executed delivery by the seller to "the buyer."—"The goods were transferred to the per-"son who paid the rent, *as much as if they were re-"moved to his own warehouse, and there deposited* under "lock and key." *

It has also been decided, that if the purchaser, with the privity and approbation of the vendor, exercise any act of ownership over the goods sold; this is sufficient evidence of a delivery, though the local situation of the goods is not changed, as will appear from the following cases.

After (*u*) a bargain and sale of a stack of hay between the parties on the spot; it appeared that the vendee had re-sold, and that the second vendee (though without the knowledge and against the approbation of the original vendee) had taken away part of the hay.—It was held

(*u*) Chaplin *v.* Rogers, 1 East. 191.

* It should be observed, that the question in this case was not, if this was a sufficient delivery within the statute of frauds, but if the right to stop *in transitu* was gone.

that

CHAP. I. that this was sufficient evidence of a delivery to, and acceptance by the first vendee.

So if a purchaser write his name or initials upon a particular article bought, it is sufficient evidence of a delivery and acceptance of the article so bought (*x*).

Where a sample (*y*) is delivered to, and accepted by the purchaser, if such sample forms part of the article sold, this will take the case out of the statute; or if the goods be weighed for the purpose of delivery, though put into another vessel than that which the vendee desired (*z*).

But to bring a case within the exceptions of the statute by the acceptance of part of the goods sold, it must be an ultimate acceptance in affirmance, and with a view to the performance, of the contract, for—

Where a plaintiff under a verbal order, had sent to the defendant a bale of sponge, which the defendant considered to be inferior in quality to that ordered, and consequently returned it, and soon after wrote a letter to the plaintiff, stating, that he had examined the sponge, and finding that it was not worth more than six shillings per pound, he had sent it back. It was held that this letter was no evidence of an acceptance of the goods by the defendant, so as to take the case out of the statute (*a*).

As to what shall be a sufficient earnest to bind the bargain, I do not find any decision.

Mr. Justice Blackstone (*b*), speaking of the contract of sale, says, "But if any part of the price is paid

(*x*) Hodgson *v.* Le Bret. 1. Campbell N. P. C. 233.—Anderson *v.* Scott, *ib.* 235. and see Skinner 647.

(*y*) Hinde *v.* Whitehouse, 7 East. 558.—Klinitz *v.* Surry, 5 Esp. N. P. C. 267.

(*z*) *Per* Wilmot J. in Simon *v.* Metivier, 1 Blac. 600.

(*a*) Kent *v.* Huskinson, 3 Bos. and Pull. 233.

(*b*) 2 Bla. Com. 447.

"down

" down, if it is but a penny, or any portion of the goods " delivered by way of earnest, the property is bound, " &c." from which passage it may be inferred, that it was the opinion of that learned judge, that earnest is a part performance of the contract on one part or other; but it may be observed, that the statute under consideration, speaks of a partial delivery of the goods, *or* the giving of *something* in earnest, *or* in part of payment, as distinct and substantive acts, in which the makers of this statute seem to have followed Glanville (*c*), whose words are, " *ita tamen quod secuta fuerit rei emptæ et venditæ* " *traditio, vel quod pretium fuerit solutum totum sive* " *pars, vel saltem quod arrhæ inde fuerint datæ & re-* " *ceptæ.*" In the case of a bargain bound by earnest put by Noy (*d*), it is said, " and you do give me a penny " in earnest"; a penny is here mentioned only as an instance, but it is presumed that a ring, a glove, or (as we may remember was the custom of the Jews) a shoe given in earnest of a bargain, and so expressed at the time, would be equally binding; earnest seems to be more a pledge than a payment, and where *money* is given in earnest it might perhaps more appositely be considered as part payment: earnest is divided by the civilians into two kinds, symbolical and pecuniary, as we learn from Vinnius (*e*). " *Datur autem arrha vel simpliciter, ut sit* " *argumentum duntaxat, et probatio emptionis con-* " *tractæ, veluti si annulus detur; vel ut simul postea* " *cedat in partem pretii data certa pecunia. Cum* " *arrha tantum ut symbolum data est, impleta emptione, id* " *est, re tradita et pretio numerato, restituenda est emp-* " *tori, cum in certa pecunia, cedit in defalcationem*

(*c*) L. 10. c. 14.
(*d*) Max. c. 42.
(*e*) Comment in Inst. 1. 3. tit. 24.

" *pretii*

CHAP. I. "*pretii, nihilque repetitur; sed reliqua pecunia re tradita exsolvenda est.*"

We next come to consider, what is a sufficient note or memorandum in writing of a contract for the sale of goods above the value of ten pounds; upon this point it has been held that a memorandum signed by the party sought to be charged * with the contract, or his agent, takes the case out of the 17th section of the statute of frauds, though not signed by the other party, as appears by the following case.

In an action on the case against the defendants for not accepting and paying for certain goods which they had contracted to purchase, it appeared that the contract was made by the following memorandum in writing (*f*).—"We agree to give Mr. Egerton nineteen pence pr. "pound for thirty bales of Smyrna cotton, customary "allowance, cash three per cent, as soon as our certi-"ficate is complete. (Signed) Matthews and Turnbull, "and dated 2d of September, 1803." The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance; and after it was allowed they signed the memorandum again. Upon this case, Lord Ellenborough, C. J. observed, "That "the words of the statute were satisfied if there were "some note or memorandum in writing of the *bargain*, "signed by *the parties to be charged by such contract.*" And this was a memorandum of the bargain; 'or at least 'of so much of it as was sufficient to bind the parties to 'be charged therewith, and whose signature to it is all

(*f*) Egerton *v.* Matthews, 6 East. 306. Selw. N.P. 773 n. 13. Allen v. Bennett, 3 Taunt. 169.

* The same construction has been put upon the 4th section of this statute. Coleman *v.* Duck, 5 Vin. Abr. 527.—Fowle *v.* Freeman, 9 Vesey, 351.—Seton *v.* Slade, 7 Vesey Jun. 265.

that

'that the statute requires'.—in which opinion the rest of the judges concurred.

But though the signature of the party seeking the benefit of such a contract is not necessary, so that the note or memorandum is signed by the party to be charged, yet the names of both parties must appear, either on the face of the memorandum, or in something which is thereby referred to, or connected with it by legal inference (*g*).

Thus: in action against the defendant (*h*), for not delivering to the plaintiff a quantity of treacle bought of him by the plaintiff, it was proved at the trial that the bargain for the treacle in question was made between the plaintiff's clerk and the defendant, as stated in the declaration, and that a note was made by the plaintiff's clerk, in a common memorandum book, specifying the quantity of treacle bought, the price, and time of delivery: in this note the treacle was stated to be "bought "of W. Plummer," *without saying by whom*—and the memorandum was also signed by "W. Plummer." This was held not to be a sufficient note in writing; and Sir James Mansfield, C. J. asked, "How that could be "said to be a contract, or memorandum of a contract, "which does not *state* who are the contracting parties? "By this note, it does not at all appear to whom the "goods were sold. It would prove a sale to any other "person as well as to the plaintiffs; there cannot be a "contract without two parties, and it is customary in "the course of business to state the name of the pur-

(*g*) Hinde *v.* Whitehouse, 7 East. 569.—Saunderson *v.* Jackson, 2 Bos. and Pull. 238.—Phillimore *v.* Barry. 1 Campb. N. P. C. 513. Coles *v.* Trecothick; 9 Vesey, jun. 250.

(*h*) Champion *v.* Plummer, 1 Bos. and Pull. N. R. 252.—5. Esp. N. P. C. 240. S. C.

CHAP. I.

" chaser as well as of the seller in every bill of par-
" cels (*i*)." But where the defendant's signature appeared in a book, purporting to be a list of subscribers to a work to be published, and not referring to, or in any way connected with, the prospectus, which contained the terms of the contract, or mentioning the names of the contracting parties, other than such signatures, it was held that such signature could not be connected with the prospectus, so as to take it out of the statute, inasmuch as parol evidence was necessary to shew the connection, which was the evil provided against by the statute (*k*).

As to what is a sufficient signing within the intent of the statute; it seems that the writing or printing of the party's name on any part of the memorandum of the contract, will be considered a signature, though perhaps written *alio intuitu*, namely, as a description of the party, vendor or vendee, and not as a signature, with a view to the statute.

As (*l*) where the plaintiff gave the defendants an order for one thousand gallons of gin, and the defendants thereupon gave the former a bill of parcels (*m*), the *printed* form of which was, " London, Bought of Jackson and " Hankin, distillers, No. 8, Oxford street"—and then followed in writing, " 1000 gallons of gin, 1 in 5. Gin " 7*s*. 350*l*."—About a month after this transaction, the defendants wrote the following letter to the plaintiff, " Sir, we wish to know what time we shall " send you a part of your order, and shall be obliged " for a little time in the delivery of the remainder;

(*i*) Plowd. 5 a.—Skinner, 647.
(*k*) Boydell *v.* Drummond, 11 East. 142.
(*l*) Saunderson *v.* Jackson, 2 Bos. and Pull. 238.
(*m*) Skin. 648.

" must request you to return our pipes. We are, your " humble servants, Jackson and Hankin." CHAP. I.

In an action on the case against the defendants for the non-delivery of the gin within the time agreed upon, it was insisted on the part of the defendants, that the contract was void by the statute, inasmuch as there was no note or memorandum in writing of the bargain, and a verdict being found for the plaintiffs, under the direction of the C. J. reserving the point made for the consideration of the court, a rule was obtained to set aside the verdict, and enter a non-suit—Upon shewing cause, aft it,

Lord Eldon, C. J. (stopping Shepherd, Serjeant, who was to have shewn cause) said, " This bill of parcels, " though not a contract itself, may amount to a note or " memorandum of the contract within the meaning " of the statute. The single question therefore is, " Whether, if a man be in the habit of printing in- " stead of writing his name, he may not be said to sign " by his printed name, as well as his written name? At " all events connecting this bill of parcels with the sub- " sequent letter of the defendants, I think the case is " clearly taken out of the statute of frauds"—" It has " been decided (*n*), that if a man draw up an agree- " ment in his own hand writing, beginning, I, A. B. " agree," *and leave a place for a signature at the bottom, but never sign it,* " it may be considered as a note " or memorandum in writing within the statute. And " yet it is impossible not to see that the insertion of the " name at the beginning was not intended to be a sig- " nature, and that the paper was *meant* to be incom- " plete until it was further signed. This last case is " stronger than the one now before us, and affords an

(*n*) Knight *v.* Cockford, 1 Esp. N. P. C. 190.

CHAP. I.

"answer to the argument that this bill of parcels was "not delivered *as* a note or memorandum of the con- "tract."—Rule discharged *. The initials of the party's agent also is a sufficient signature (*o*).

In the progress of our inquiry into the construction put by the courts upon this section of the statute of frauds, it now becomes necessary to investigate the question, who is an agent of the party to be charged, for the purposes of this act?

Sales are either by private contract or public auction. Sales by private contract are usually transacted through the intervention of brokers, who are for that purpose the agents of the parties, as are also all clerks and servants without any special authority, where buying and selling is within the scope of their usual employment; but this branch of the subject will be handled in another part of this treatise. As to sales of goods by public auction it has long been *vexata quæstio*, whether they are within the statute of frauds or not.

The most important and leading cases upon this point will be thrown together with such observations as may suggest themselves to the author: the reader will then form his own judgement upon the subject.

The first case upon this question is Simon *v.* Metivier or Metivos (*p*): which was an an action on the case for

(*o*) Phillimore *v.* Barry, 1 Campb. N. P. C. 513.

(*p*) 1 Bla. 599.—3 Burr. 1921. S. C.

* As this case appears in the report, it seems at variance with the position in page 17, that the names at least of both parties to the contract ought to appear in the memorandum; but though it was not necessary to advert to that point in the argument in this case, the fact was, that the name of the purchaser was stated in the bill of parcels.—*Vide* Champion *v.* Plummer, 1 Bos. and Pull. N. R. 254.

not

not taking away certain drugs of the value of one hundred and ten pounds, which had been bought by the defendant at an auction. The jury having found a verdict for the plaintiff, a new trial was moved for, on the ground that the sale was void under the statute of frauds; being a sale of goods above the value of ten pounds, and there being no earnest, or note, or memorandum signed by the party; (another point was made, which is not material to this question.)

The court expressed the inclination of their opinion to be, "That sales by auction in general are not within the statute."—And Lord Mansfield, C. J. said, "They "certainly existed in England, and in other countries "at the date of this statute. The auctioneer is a third "person, who is, to many intents, the agent of both "parties. *The solemnity of that kind of sale precludes* "*all perjury*, as to the fact of the sale itself. The *con-* "*tract* is executed when the hammer is knocked down. "I remember a case where some sugars were bought at "an auction, and afterwards consumed by fire in the "auction warehouse, and the loss fell upon the buyer. "And according to the inclination of my opinion, auctions "in general are not within the statute. But this is not "necessary to be now determined, for if they are with- "in it, the requisites of the statute are well complied "with. Every bidding is an accession to the conditions "of sale. The name is put down by the buyer's autho- "rity. No latitude is left to fraud and perjury from the "loose memory of witnesses."—And Wilmot, J. said, "It may be a great question, whether sales by auction "are within the statute. They were certainly not meant "by the act, which was to extend only to the mis- "chiefs created by private and clandestine sales."— "I therefore incline to think sales by auction, *openly* *transacted*

CHAP. I. "*transacted before five hundred people are not within* "*the statute.*"

Upon the ground that, even assuming sales by auction to be within the statute, the requisites of the statute had been complied with by the auctioneer, in writing down the buyer's name; the rule *nisi* for a new trial was discharged.

The observations which arise out of this case naturally resolve themselves into two classes; upon the statute itself, and upon the reasons on which the opinions of the two learned judges before named were founded.

1st. Upon the statute; the words are, that "*No contract* "for the sale of any goods, wares, and merchandises, &c. "shall be good except."—It becomes material for us then to examine what is a contract? A contract is thus defined by our law: "an agreement upon a sufficient con- "sideration, to do, or not to do, a particular thing (*q*)." Apply this definition to the contract of sale; it is an agreement by the vendor to transfer a particular article to the vendee in consideration of a certain price. Upon the price therefore being ascertained, a present contract is actually completed, though the continuing obligation created by it, may depend upon those ulterior acts imposed by law upon the contracting parties; so by the civil law, "*Emptio & venditio contrahitur simulatque de pretio convenerit* (*r*)." Thus, if A have a horse to dispose of, and offer it to B for fifty pounds, at which price B consents to buy it, this will be universally allowed to be a contract within the statute, and if any of the requisites prescribed by it are complied with, will be obligatory on the contracting parties. But had this horse been sold by auction the only difference would have been, that the offer of the price would have come on the part

(*q*) 2 Blac. Com. 442. (*r*) Inst. l. 3. tit. 24.

of

of the vendee, and the assent (*s*) to that offer on the part of the vendor, by the knocking down of the auctioneer's hammer, by which act says Lord Mansfield, "The *contract* is executed (*t*)."

The same learned and noble Lord says (*u*), "The key "to the construction of the act is, the intent of the le- "gislature;" now the intent of the legislature is expressly stated in the preamble of the act, to be "the "prevention of many fraudulent practices, which are "commonly endeavoured to be upheld by perjury, and "subornation of perjury," to carry this intent into effect, the legislature seems to have most wisely proposed to remedy the evil by removing the cause, and in order to obviate the inducement to perjury in support of parol contracts (without any reference to the *quantity* of such parol evidence), it is enacted in the most general and comprehensive words, that "*No* contract" shall be good, unless evidenced as by the said act is directed.—Unless then we can say, that a sale by auction is not a contract, it would seem that such a sale is within the meaning of this section of the act.

On another section (*x*) of this statute by which contracts for the sale of *lands* or interest in lands, are also required to be in writing, it has been held by a series of cases, that such sales by auction are within the statute (*y*). The reason of the distinction it is not easy to perceive: the *form* of the two clauses is not the same certainly; but

(*s*) *Consensu fiunt obligationes in emptionibus, venditionibus, &c.* Inst. l. 3. tit. 23. and *see* Plowd. 140. b. 141.

(*t*) In Simon *v.* Metivier, 1 Blac. 601.

(*u*) Ibid 600.

(*x*) § 4.

(*y*) Stansfield *v.* Johnson, 1 Esp. N. P. C. 101.—Walker *v.* Constable, 2 Esp. N. P. C. 659. and 1 Bos. and Pull. 306. S. C. Buckmaster *v.* Harrop, 7 Vesey jun. 344. Appealed, 13 Ves. 456. on 12 Dec. the 466.

CHAP. I. the terms, as to the memorandum in writing, are exactly the same (z).—In the one section the words are, "no "action shall be brought upon *any contract*," and in the other, "*No contract* shall be good."—Yet the 4th section has been construed to include sales by auction, whilst great doubts have been entertained if a similar construction should be put on the 17th section.

2dly. The reasons upon which my Lord Mansfield and Mr. Justice Wilmot inclined to think sales by auction out of the statute, as stated in the report in 1 Blac. are "That the solemnity and publicity of that kind of sale, "precludes all perjury as to the act of sale itself*:" upon this my Lord Ellenborough, (in Hinde *v.* Whitehouse *(a)*) observes, "With all deference to these opinions, I do "not at present feel any sufficient reason for dispensing "with the *express requisition* of a memorandum in "writing in a statute applying *to all sales* of goods above "the value of ten pounds *without exception*, merely "because the *quantum* of parol evidence in the case of "an auction is likely to render the danger of perjury less "considerable. That argument in a degree applies to "all sales in market overt: and if we once get loose "from the positive words of the statute, it will become "a question only of the *quantum* and degree of danger "of perjury in each particular instance: which opens a

(z) Lord Eldon in Coles *v.* Trecothick, 9 Vesey, jun. 249.

(a) 7 East. 568.

* This argument assumes that the *only* object of the statute was to prevent the committing of perjury, which though a principal object, was not the sole one; "another object was to lay down a clear and positive rule to determine when the contract of sale should be complete." *Per* Lord Loughborough in delivering judgment of the court in Rondeau *v.* Wyatt (a).

(a) 2 H. Bl. 63.

door

" door to an indefiniteness of construction founded on " all the varying circumstances of the time, and frequency " of persons attending the place of sale, and the like; " which would be destructive of all certainty of practice, " and render the rule of the statute perhaps more mis- " chievous than beneficial to the trading world, who are " to be governed by it. I am not therefore prepared to " say that sales by auction are not meant to be com- " prehended within the statute,"—but his Lordship added, " that he wished not to be understood as giving " any conclusive opinion to the contrary." It would be as presumptuous ~~and~~ as unnecessary to add any thing to what has fallen from so distinguished an authority.

Assuming then that sales of goods by auction are within the statute of frauds; the auctioneer is an agent for the buyer as well as the seller, and a memorandum made by him of the bargain is sufficient to bind both parties (*b*).

Thus (*c*): where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognised the purchase. Held that the entry in the catalogue and the letter, coupled together, were a sufficient memorandum of the contract within the statute of frauds.

But the catalogue must contain a memorandum of the terms of the contract; for in a case (*d*) where sugars were put up to sale in pursuance of a catalogue of sale, which had been previously distributed for that purpose, con-

(*b*) Simon *v.* Metivier, 1 Blac. 599.—3 Burr. 1921.—Emmerson *v.* Heelis.—2 Taunt. 38.

(*c*) Phillimore *v.* Barry, 1 Camp. N. P. C. 513.

(*d*) Hinde *v.* Whitehouse, 7 East. 567.

taining

CHAP. I. taining the lots, marks, number of hogsheads, and gross weights of the sugars, and referring for further particulars to the brokers; and they were accordingly sold according to certain conditions of sale, *which the auctioneer read to the bidders assembled*, as the conditions on which the sale of the sugars enumerated in the catalogue was to be made. It was held, that the name of the purchaser written by the auctioneer against the lot purchased, in such catalogue, which was not annexed to the conditions of sale, nor had any internal reference thereto by context or the like, was the mere memorandum of the name of a person, and not a memorandum of a bargain under these conditions of sale (*e*).

Also where a broker is agent for both parties, the memorandum in his book signed by him is sufficient without any bought and sold notes being sent to the parties (*f*) *a fortiori*, where such notes are sent (*g*).

But one of the contracting parties cannot be considered as the authorized agent of the other; the agent must be a third person (*h*).

The last consideration which arises upon this branch of the statute is, as to the manner in which such agent must be appointed to satisfy the description of an agent "lawfully authorized." The whole current of the authorities shews that a parol appointment is sufficient (*i*); and the authority need not be given with a view to a particular transaction; a general authority is sufficient (*j*).

(*e*) *Vide* Boydell *v.* Drummond, 11 East. 142.

(*f*) Heyman *v.* Neale, 2 Campbell, N. P. C. 337.

(*g*) Rucker *v.* Cammyer, 1 Esp. N. P. C. 105.—Lord Ellenborough in Hinde *v.* Whitehouse, 7 East. 569.

(*h*) Wright *v.* Dannah, 2 Camb. N. P. C. 203.

(*i*) *Per* Lord Eldon in Coles *v.* Trecothick, 9 Vesey. jun. 250. and Lord Kenyon in Rucker *v.* Cammyer.--Chapman *v.* Partridge, 5 Esp. N. P. C. 256.

(*j*) Anon. Lofft. 332.

And

And such authority may be revoked at any time pending the contract; and before a memorandum or note thereof is written and signed (*k*).

It ought here to be observed that where a party sought to be charged by a parol contract, admits the making of such contract, it is out of the statute (*l*): which rule also prevails in equity (*m*): but such admission must be pure and unqualified; not relying upon the statute (*n*), for where the statute is pleaded, and the exceptions of it negatived, the court of chancery will not compel the defendant to execute the contract (*o*); so if a parol agreement were stated in a court of law, and there was a demurrer, which would admit the agreement, yet advantage might be taken of the statute (*p*): for by the demurrer the defendant says he is not chargeable by law, and therefore this is an admission insisting upon the statute.

It will be recollected that these provisions of this section of the statute of frauds, are confined to contracts for the sale of goods *above the value of ten pounds;* sales of goods under that value then remain as at common law, when the agreement is to be executed within the space of one year.

And where a contract has been made according to the requisitions of the statute, the property is changed, and vests in the vendee from the time of such sale (*q*), and, though

(*k*) Farmer *v.* Robinson, 2 Campbell, N. P. C. 339 note

(*l*) *Per* Mansfield, C. J. in Simon *v.* Metivier, 1 Blac. 600.—Middleton *v.* Brewer.—Peake's N. P. C. 15.

(*m*) 2 Atk. 155.—1 Vesey 218, 221.—Ambl. 586.

(*n*) Prec. in Chan. 208, 374, 353.

(*o*) Whaley *v.* Bagenal, 6 Bro. Parl. Cases 45.—Whitechurh *v.* Bevis.—2 Bro. Ch. Rep. 556, and Cases there cited.

(*p*) *Per* Lord Loughborough, in Rondeau *v.* Wyatt, 2 H. Bl. 68.

(*q*) Hankey *v.* Smith, K. B. Sittings at Guildhall after E. T. 36 G. 3.—Peake's, N. P. C. 42 note.

After a resale by the vendor he cannot bring an action for goods bargained sold & sold. Hore v. Milner, Peake, 42, a; but in a subsequent case, the resale was held to be no bar to the action, tho' it might perhaps be

not

CHAP. I. no actual change of possession has taken place, remains at his risk, as we may recollect is the case at common law,—this will be seen by the following case:

In an action for goods sold and delivered (*r*), it appeared that the goods in question, which consisted of thirteen puncheons of rum, part of the cargo of a Danish prize were lodged in the warehouses of Messrs. Fector and Minet, at Dover, and sold by auction in various lots on the 28th of April, 1808. By the conditions of sale, a deposit of twenty-five *per cent.* was to be paid immediately, and the remainder of the purchase-money in thirty days. At the end of that time, the purchasers were to carry away the goods, or were afterwards to pay warehouse-rent. The thirteen puncheons of rum which were the subject of this action, were at such auction bought by the defendant's agent. And on the 18th of the same mouth, the warehouses in which the rum was, accidentally caught fire, and by means of a quantity of gunpowder lodged in them, were blown into the air. There was no evidence of the deposit being paid. It was held by Lord Ellenborough, C. J. that the property vested absolutely in the purchasers from the moment of the sale, the agreement to give stowage room to the goods free of expence for thirty days being intended for the ~~buyer's~~ purchasers' benefit, and was part of the consideration for which the purchase-money was to be paid. The loss therefore fell on the purchasers.

But this is to be understood only where no act remains to be done on the part of the vendor, for where any act of the ~~seller~~ vendor such as counting, weighing, filling up, &c. remains to be done to ascertain the exact quantity sold, the property does not vest absolutely (*s*) in the

(*r*) Phillimore v. Barry, 1 Campbell, N. P. C. 513, and *see* Lord Ellenborough in Hinde v. Whitehouse, 7 East 571.

(*s*) Hanson v. Meyer, 6 East 614.

vendee:

vendee: but until such act is done remains at the risk of the vendor, as where (*t*) turpentine in casks was sold by auction at so much per cwt. and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest, before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days on the goods being delivered, and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for thirty days, after which they were to pay rent; the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the customhouse officer to guage them; but before he could fill up the rest a fire consumed the whole of the warehouse within the thirty days: it was held that *the property passed to the buyers, in all the casks which were filled up, because nothing further remained to be done to them by the seller;* for it was the business of the buyers to get them guaged, without which they could not have been removed, and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the guaging, must be taken to have been done as agent for the buyers, whose concern the guaging was. *But the property in the casks not filled up remained in the seller, at whose risk they continued.*

CHAP. I.

So (*u*) where a quantity of goat skins were sold under the following contract.

" Bought of Mr. S. Zagury, of Great Prescot Street, " two hundred and eighty-nine bales of goat skins from

(*t*) Rugg *v.* Minett, 11 East 210.

(*u*) Zagury *v.* Furnell, 2 Campbell, N. P. C. 240. S. P. Dig. 18, 6, 1, 1

Mogadore,

But Jemble, that where the vendor is prevented from comple[illegible] the delivery by the act of the vendee, the property i[illegible]

CHAP. I. "Mogadore, per Commerce, Captain John Horswell, "containing five dozen in each bale, at the rate of fifty "seven shillings and six-pence per dozen, to be taken as "they now lay with all faults, paid for by good bills at "five months." "London 27th of April, 1809."

"Fourteen days prompt."

It appeared, that by the usage of the trade, it was the duty of the seller of goat skins by bales, in this manner to count them over, that it might be seen whether each bale contained the number specified in the contract. It also appeared, that on the 14th of May, before any of the skins in question had been counted over, the whole were destroyed by fire at the wharf where they lay at the time of sale. It was held by Lord Ellenborough, that as the enumeration of the skins was necessary to ascertain the price, this was an act for the benefit of the seller; and that as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and the skins continued at the seller's risk.

But ~~although some~~ act as weighing or measuring remains to be done as between the vendor and a third person, ~~yet if no such act is to be done as between the vendor and vendee,~~ the sale is complete; as where A having forty tons of oil in a cistern (*x*) sold ten tons to B, and received the price: and B sold the same to C, and took his acceptance for the price at four months, and gave him a written order for delivery on A, who wrote and signed his acceptance upon the said order, but no actual delivery was made of the ten tons, which continued mixed with the rest in A's cistern; it was held that this was a complete sale and delivery of the ten tons, nothing remaining to be done on the part of the B the vendor.

(x) Whitehouse v. Frost, 12 East. 614. Herein

CHAP. I.

Herein our law agrees with the principle of the civil law. "*Quum autem emptio et venditio contracta sit* "*(quod effici diximus simulatque de pretio convenerit)* "*periculum rei venditæ statim ad emptorem pertinet,* "*tametsi adhuc ea res emptori tradita non sit (y).*" Which passage is thus explained by Vinnius (*z*). "*Est vero* "*in his rebus probata hæc distinctio ut si omne vinum* "*vel oleum, vel frumentum, vel argentum, uno pretio* "*seu aversione venierit, idem juris sit, quod in cæteris* "*rebus perfectaque emptio intelligatur, statim ut de pretio* "*convenit. Quod si hæc non uno pretio, sed ita venierint,* "*ut in singulas amphoras vini, in singulas metretas* "*olei, in singulos modios frumenti, in singulas libras* "*argenti, certum pretium diceretur, non prius, quan-* "*tum ad periculum, perfecta videatur venditio quam* "*res hijusmodi adnumeratæ, admensæ, appensæve sint,* "*quasi venditio sub hac conditione contracta sit (a).*"

SECT. II.

Of Executory Contracts of Sale.

THE contract of sale may be executory in two points of view: 1st, Where it is executory on the part of both the contracting parties. 2dly, Where executory on one part only.

Where the contract is wholly executory, as in contracts for the sale of goods in which the vendor has no present property, it is more properly an agreement *to sell* than an actual sale, which can only be of a *chose* in possession (*b*). This species of contract is well known to mercantile men, amongst whom it is very usual to

(*y*) Inst. l. 3. tit. 24.

(*z*) Comment. in Inst. l. 3. tit. 24. vol. 2. p. 188.

(*a*) See also Ff. l. 18. tit. 6.—Cod. l. 4. tit. 18.

(*b*) Co. Litt. 214.—Plowd. 9 a.

contract

CHAP. I. contract for the sale of goods which they have reason to expect will be consigned to them by their correspondents abroad, as in the case of Boyd *v.* Siffkin (*c*); which was an action for the non-delivery of hemp.—The declaration, after stating that the defendant expected an importation of hemp into this country, in a certain ship called the Fanny Almira, alledged, that he agreed to sell to the plaintiff, on arrival of the said ship Fanny Almira, about thirty two tons (more or less) of Riga Rhine hemp at eighty two pounds ten shillings per ton, from the landing scale, the amount to be paid by bills at six months.

The bought and sold note produced, was dated 13th of August, 1808, and was in the following form:

"*Sold* for Mr. H. Siffkin to Mr. M. Boyd, about "thirty two tons, more or less, of Riga Rhine hemp *on* "*arrival*, per Fanny and Almira at eighty two pounds "ten shillings per ton, &c."

The ship afterwards arrived, but without a cargo.

Garrow for the defendant contended, that the contract was improperly set out in the declaration, on arrival, meaning not on the arrival of the ship, but of the hemp, and he cited Hawes *v.* Humble (*d*).

The Attorney General argued that this was a sale of the quantity of hemp mentioned in the note, depending only on the contingency of *the ship's arrival*, and that the defendant had undertaken that if the ship did arrive, she should bring so much hemp as was thus sold, but Lord Ellenborough said,—"I clearly think, *on arrival* "means on arrival of the hemp. The parties did not "mean to enter into a wager. By *bought* and *sold* in the "note, must be understood *contracted to sell and to buy.*

(*c*) 2 Campbell, N. P. C. 326. 1809. Coram Wood B. cited in
(*d*) Lancaster Summer Assizes, 2 Campb. N.P.C. 327.

"The

" The hemp was expected by the ship. Had it arrived " it was sold to the plaintiff. As none arrived the con- " tract was at an end."

Plaintiff non-suited.

The case of Hawes *v.* Humble, cited in the foregoing case was exactly similar; the facts of that case are shortly these:

The defendant by a broker had sold to plaintiff, *on arrival*, one hundred tons, more or less of Teneriffe barilla in the defendant's ship Bon Fim Tuan Feliciano from Teneriffe.—The Bon Fim arrived, but without any barilla; and it was held by Wood, B. that the contract was conditional, but he intimated, that if any negligence could be proved against the captain, in not procuring the barilla, he would receive the evidence; but no such proof was given.

The Court of King's Bench afterwards refused a rule to shew cause why there should not be a new trial, agreeing completely with the learned judge who tried the cause.

So if a merchant in London contract for the sale of *all* the goods of a particular description, that his agents abroad may ship by certain vessels—As (*e*) where in an action for the non-delivery of hemp, the agreement proved was as follows: " Sold for Messrs. Scougall and Co. to " Messrs. Hayward and Co. *all* the sound merchant- " able Riga Rhine hemp, that may be loaded by the " Pilgrim, Webster, and one or two other ships, not " exceeding three hundred tons, now at Riga, *by the* " *supercargo of the said vessels, or Messrs. Schmids* " *and Co. the agents of the concern,* the names of the " ships to be given up when received, at eighty one " pounds per ton."—

(*e*) Hayward *v.* Scougall, 2 Campbell N. P. C. 56.

CHAP. I.

The names of two other ships were subsequently given up: but when they arrived along with the Pilgrim, it appeared that although Messrs. Schmids had loaded each of them with a full cargo of hemp, they had not shipped by them more than seventy one tons on account of the defendants: that quantity was delivered to the plaintiffs, and the question was, whether the defendants were not bound to deliver three hundred tons, so much having been shipped on board of these vessels at Riga. But it was held they were not, and Lord Ellenborough, C. J. construed the contract thus; "*We will sell* you all "that our agents at Riga ship for us, to the amount of "three hundred tons. If they send us so much, you "shall have it; if they send us none, we *have sold none* "*to you.*"

But if the vendor in contracts of this sort, state in the contract, that the goods agreed to be sold shall actually be shipped, in that case he is liable at all events, whether the goods be in fact shipped or not: as in Splidt *v.* Heath and others (*f*); where the bargain was *for a certain quantity of hemp*, sold by the defendants to the plaintiff, "*to be shipped on or before the 31st of August, old style.*"—in this case a full cargo had been prepared by the agents of the vendors; but before shipment it was seized and confiscated by the Russian government. But this was held to be no defence in an action for the the non-performance of the contract, as the defendants had absolutely engaged that the hemp should be shipped, and therefore from whatever cause it had arisen that it had not been done, they were liable.

To this class of executory contracts also belong those cases where the thing contracted for is not *in esse*, as

(*f*) 2 Campbell, N. P. C. 57. n.

goods;

goods, but is sold, (or more properly *agreed* to be sold) with a view to its prospective existence as such: such as the case of a chariot to be built (*g*); corn to be thrashed (*h*); a waggon to be made (*i*); or a barge built (*k*); which differ from a sale of goods *in presenti*, inasmuch as no property vests in the vendee in these cases, till the thing contracted for acquires the character in which it is to be delivered, and that though the whole price be paid in advance (*l*); whereas in present sales, we may recollect the property vests immediately in the vendee by the bargain (*m*). CHAP. I.

In these executory contracts, as soon as the thing contracted for is complete and ready for delivery, the contracting parties acquire mutual rights to demand, the one the goods, and the other the price (*n*); but these are reciprocal dependant rights; for the vendor may still retain his goods till paid, and the vendee may maintain trover for the goods if they are not delivered upon tender of the price (*o*), unless it has been otherwise agreed between the parties.

It may not be unnecessary here to observe, that in those executory contracts mentioned in the first part of this section, the property in the thing sold vests in the vendee upon arrival, *i. e.* where the *transitus* is completely at an end, and the absolute property (in the absence of any sale) would have vested in the vendor; provided the vendee perform,

(*g*) Towers *v.* Osborne. 1 Str. 506.

(*h*) Clayton *v.* Andrews. 4 Burr. 2101.

(*i*) Dunmore *v.* Taylor, Peake's, N. P. C. 41.

(*k*) Mucklow *v.* Mangles, 1 Taunt. 318.

(*l*) Ibid.

(*m*) And see what said by Heath, J. in Mucklow *v.* Mangles, 1 Taunton, 320.

(*n*) Towers *v.* Osborne, 1 Stra. 506.--Dunmore *v.* Taylor, Peake's, N. P. C. 41.—Mucklow *v.* Mangles,

(*o*) Noy's Max. c. 42.

CHAP. I. or offer to perform, the contract on his part; in such case the *contract to sell is changed* into a *contract of sale* (*p*).

Executory contracts for the sale of goods above the value of ten pounds *only*, and which do not relate to the making of that which may hereafter become goods, we may remember, are considered to be within the seventeenth section of the statute of frauds, the requisites of which, must consequently be complied with to render these contracts binding (*q*); and *all* executory contracts, which *are not to be performed* within one year from the making, whether for the sale of goods, (without reference to the value) or the doing of any other act, must be in writing by the fourth section of the same statute, by which it is enacted, "That no action shall be brought "whereby to charge any person upon any agreement "that is not to be performed within the space of one "year from the making thereof, unless the agreement "upon which such action shall be brought, or some me- "morandum or note thereof, shall be in writing, and "signed by the party to be charged therewith, or some "other person thereunto by him lawfully authorized."

This clause of the statute is confined to those cases where it clearly appears to have been the understanding of the parties, that the contract was not to be completed within a year (*r*); but it does not include contracts which by possibility, and in the contemplation of the parties, *may* be performed within the year, though the contingency on which they depend does not, in fact, happen within time: as in the case (*s*) of a promise on a good conside-

(*p*) Noy's Max. c. 42.—Com. Dig. tit. Agreement. (a. 2.)

(*q*) Ante. p. 8.

(*r*) Boydell *v.* Drummond, 11 East. 155.

(*s*) Anon. 1 Salk. 280.

ration

ration to pay money on the return of a ship, which by possibility might return within a year, such promise by parol is good, though the ship do not return till after the year is expired.

So in the case of Peter *v.* Compton (*t*), which was an action on the case upon an agreement, in which the defendant promised, for one guinea "to give the plaintiff "so many at the day of his marriage." The question "was, if such agreement ought to be in writing:" for the marriage *did not happen within one year*.—It was held by a majority of the judges, against the opinion of Holt, C. J. and another. "That where the agreement "is to be performed upon a contingent, *and it does not* "*appear within the agreement*, that it is to be performed *after the year*, there a note in writing is not necessary; for the contingent might happen within the year: "but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there "a note is necessary; otherwise not."

The opinion expressed by Lord Holt, and the other judge who agreed with him was—that where the contingency happens within the year no note in writing is necessary, *aliter* if it do not happen till after the year, for they considered, that as the statute was made to prevent perjury, it was the design of the framers of it, not to trust to the memory of witnesses for a longer time than one year (*u*)—an opinion which carries great plausibility with it, and would stand well with the words of the statute, which speaks of "agreements that are not to "be performed."

(*t*) Skinner, 353.

(*u*) Smith *v.* Westall, 1 Lord Raym. 316, 317.—Francam *v.* Forster, Skin. 326.—Reynolds *v.* Spencer Cowper in Scacc' in 1726.—Viner Abg. tit. Cont. and Agmt. p. 524. § 47.

The

CHAP. I.

The contrary opinion, however, is held for law at this day, and it was so decided in Fenton *v.* Emblers (*x*), which was an action against an executor for non-performance by his testator, of an agreement by *parol*, entered into between him and the plaintiff, by which he agreed, that in consideration that the said plaintiff would be and become the housekeeper and servant of the testator, and take upon herself the care and management of his family, &c. as long as it should please both parties, the testator promised to pay wages to the plaintiff, at and after the rate of six pounds for a year; "and also by his "last will and testament to give and bequeath to the "plaintiff a legacy or annuity of sixteen pounds by the "year, to be paid and payable to her yearly, and every "year from the day of the testator's death, for and dur-"ing the term of her natural life."—It appeared that the plaintiff had under this agreement, entered into the service of the testator, and had continued with him for *more than three years*, but that he had not left her the legacy or annuity.—Upon an objection being taken that this agreement was within the statute of frauds, being to be performed after the expiration of a year. The court held that it was out of the statute; *per* Denison, J. "The statute of frauds plainly means an agreement "*not* to be performed within the space of a year, ex-"pressly and specifically so agreed. A contingency is "not within it, nor any case that depends upon a con-"tingency. It does *not* extend to cases where the "thing *only may* be performed within the year."

But to take a case of this sort out of the statute, it should appear that the parties contracting understood,

(*x*) 3 Burr. 1231. and 1 Blac. 353. S. C.

and

and contemplated a possibility of a complete, and not a partial performance within the year. CHAP. I.

For where (*y*) A had proposed to publish by subscription a series of large prints from some of the scenes in Shakespeare's plays, after pictures to be painted for that purpose, under certain conditions, viz. seventy-two scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing four large prints, at the price of three guineas a number, two of which were to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number; and that one number at least, should be *annually* published. B had become a subscriber for a set of these prints, and paid his two guineas; but afterwards refused to pay the remaining part of his subscription and take the prints; an action was brought against him upon the contract contained in the prospectus: but the plaintiff failing in proving a contract in writing, signed by B, was non-suited. And upon shewing cause against a rule, for setting aside the non-suit, it was unanimously held, that the action was not maintainable, inasmuch as this was not a contract to be performed within a year, and which ought therefore to have been evidenced by writing, signed as required by the statute of frauds—and *per* Lord Ellenborough, C. J. "The whole scope of the undertaking shews that it was "not to be performed within a year: and if contrary to "all physical probability, it could have been performed "within that time, yet the whole work could not have been "obtruded upon the subscribers at once, so as to have

(*y*) Boydell *v.* Drummond, 11 East. 142.

entitled

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" entitled the publishers to demand payment of the " whole subscription from them within the year. It has " been argued that an inchoate performance within a " year, is sufficient to take the case out of the statute; " but the word used in the clause of the statute is *per-* ' *formed*, which *ex vi termini*, must mean the complete " performance or consummation of the work:"—" be- " sides, by the very terms of the contract, and clearly in " the contemplation of the parties from the whole scope " of it, it was not to be performed within a year, for the " agreement was to publish at least one number *annually* " after the delivery of the first."

With respect to that class of contracts falling within the fourth section of the statute of frauds, and as such, required to be evidenced by a note in writing, it is proper to point out a distinction which has been drawn between them, and those falling within the seventeenth section; which arises from the different wording of those two clauses.

The words used in the seventeenth section are, " No " contract, &c. shall be good, except the buyer shall " accept, &c. or that some note or memorandum in " writing of the said bargain be made and signed, &c." But upon referring to the clause under consideration, we find it is enacted, " that no action shall be brought" in the cases there enumerated, unless the " *agreement* " upon which such action shall be brought, or some me- " morandum or note thereof, shall be in writing, and " signed by the party to be charged therewith, &c."

The whole of this difference turns upon the word *agreement*, made use of in the latter section; an agreement is defined by our law to be "*aggregatio mentium*," or the union of two or more minds in a thing done, or to be

be done (z), and is therefore not to be understood in the loose incorrect sense in which it is sometimes used, as synonymous to promise or undertaking; but in its more proper and correct sense, as signifying a mutual contract or consideration between the parties; the promise therefore of the party to be charged alone, will not satisfy the word agreement, the consideration for such promise must also be supplied, to make a perfect agreement, so that each party may see what he is to do or suffer; what is required to be in writing therefore, is the *agreement*, as thus explained, or some note or memorandum of it;—this will be illustrated by the following cases:

This was an action upon a promise to pay the debt of a third person in consideration of forbearance to sue (a).

In support of the action the plaintiffs, on the trial, produced the written engagement, signed by the defendant, which was in these words: "Messrs. Wain and "Co. I will engage to pay you by half past four this "day, fifty-six pounds and expences on bill to that "amount on Hall, (signed) John Warlters;" (and dated) "No. 2, Cornhill, April 30th, 1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, was in writing, as required by the statute of frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence (which the plaintiffs proposed to call, in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum, it

(z) Plowd. 5 a. 6 a. 17 a.—Dyer, 336. b.

(a) Wain *v.* Warlters, 5 East. 10.

stood

CHAP. I. stood simply as an engagement to pay the debt of another, without any consideration; and was therefore *nudum pactum*, and void; of which opinion was Lord Ellenborough, C. J. and therefore nonsuited the plaintiffs.

A rule *nisi* was afterwards obtained for setting aside this nonsuit, and granting a new trial, on the ground that the statute only required the *promise*, or binding part of the contract, to be in writing; and that parol evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.—But the court agreed with the Chief Justice, and held that if they were to admit parol evidence to shew the consideration of the promise, the effect would be to open a door to those very frauds and perjuries which it was the object of the statute to prevent,—they therefore

Discharged the Rule (*b*).

This (*c*) was an action on the case for the breach of a guarantie in not paying the value of goods delivered by the plaintiff to one Nichols. The defendant gave a written guarantie signed by him, in this form: "I guarantee the payment of any goods which J. Stadt delivers to J. Nichols." It was objected at the trial before Lord Ellenborough, C. J. at Guildhall, that this guarantie was void under the fourth section of the statute of frauds: 29 Car. II. c. 3. which avoids any promise to answer for the debt of another unless the agreement be in writing, &c: and Wain *v.* Warlters was cited to shew that the word agreement included the consideration for the promise, as well as the promise itself: and here there was no consideration stated for the promise. But Lord Ellen-

(*b*) See also *ex parte* Minet, 14 Vesey, jun. 189, and 15 Vesey, jun. 287.

(*c*) Stadt *v.* Lill, 1 Campbell, N. P. C. 242.—9 East. 348. S. C.

borough

borough was of opinion that the stipulated delivery of the goods to Nichols was a consideration appearing on the face of the writing, and when the delivery took place the consideration attached; and he directed the jury accordingly; who found for the plaintiff: but he gave leave to the defendant to move to enter a nonsuit if this direction were wrong.

A motion was afterwards made, but the court were satisfied that the direction was right, and

Refused the Rule.

Questions of this sort can very rarely occur in practice, on contracts of sale which may fall within this section, as they are usually evidenced by the broker's bought and sold notes, which contain in general a note of the *whole agreement:* it was however considered necessary to give some account of the decisions on this branch of the statute.

2dly. Contracts of sale may also be executed on one part, and executory on the other; as if, on an agreement for the purchase of goods, the vendee pay the price in advance, here the contract is executed by him, and executory by the vendor; or if, as is more frequently the case, the goods are presently delivered by the vendor, to be paid for by the vendee at a future period; the contract will then be executory on the part of the vendee only: in both of which cases the property of the thing sold vests immediately in the vendee (*d*); that is, where the contract is for goods existing *in solido*, at the time of the contract; for we have seen no property passes, till delivery, by a contract for goods to be manufactured for the vendee; indeed a contract of this sort is not strictly

(*d*) 10 H. 7, 8. a.—14 H. 8, 20. a.—Dyer, 30. a.—Bro. Contract, 35.—Kit. 181. a.—Noy's Max. c. 42.—Mucklow *v.* Mangles, 1 Taunt. 318.—*Ex parte* Flinn, 1 Atk. 185.

a contract

CHAP. I. a contract for the sale of goods, but for work and labour, it is that species of contract which the civilians call, *do ut facias.*

In the first case put upon this class of contracts, where the vendee pays the price in advance, the goods immediately becomes his, and may be recovered from the vendor, and all others into whose possession they may fall, by an action of trover; or the vendee may have at his election, an action against the vendor for non-performance of his contract.

So *e converso*, where the goods are delivered upon credit, they become as absolutely the property of the vendee as if the money were actually paid, and upon failure by the vendee in paying for them at the stipulated time, the vendor cannot claim a re-delivery of the goods, but must resort to his action for recovery of the price: but to vest such an absolute indefeasible property the goods must have actually come to the hands of the vendee, for otherwise, as we shall have occasion to mention in another part of this treatise, the vendor has a right to stop the goods *in transitu*, upon non-performance of the contract on the part of the vendee, or his insolvency.

Where there is a regular sale note, the term of credit, and manner of payment, whether by cash, or bill, is usually specified: in transactions of any magnitude the payment is usually made by the acceptances of the vendee, payable at given periods, to be given immediately upon the sale, or at the expiration of a specified credit; or a period is fixed for the payment, without the vendee being required to give any negociable security in the mean time: in some branches of trade custom has fixed one universal standard as to the period of credit upon sales of goods; and upon sales in the usual course of such trades, where no specific stipulation is made in the

the contract (*e*), this customary credit is as much a part of the contract as if *expressly* agreed upon, the law implying that all persons deal according to the general usage, unless the contrary appears.

In any of these cases the contract of sale remains executory on the part of the vendee, till the expiration of such period of credit; and the vendee cannot maintain an action for the value of his goods in the interim, though where by the terms of sale, the vendee is to give his acceptance for the price at any given time, and does not, the vendor may bring a special action on the case against him for not accepting; in which action he will recover damages for the injury he has actually sustained by the breach of contract, such as the loss of interest, &c.—This will be seen by the following cases:

In an (*f*) action for goods sold and delivered, tried before Rooke, J. at the Lancaster assizes; the question was,—Whether the action were commenced before the time of credit, on which the goods had been contracted to be bought, had expired? The goods in question were a quantity of cotton, valued at two hundred and seventeen pounds, for which payment was to be made by the defendant in three months after the 15th of September 1802, (the day on which the bargain was concluded), by a bill of two months. The action being commenced before the expiration of five months from the 15th of September preceding, the defendant's counsel objected that it was prematurely brought, and therefore that the plaintiff should be nonsuited: but the learned Judge held, that unless the defendants could shew (which they did not do) that they had given or tendered such a bill

(*e*) Swancot *v.* Westgarth, 4 East, 74. and what said by Lord Ellenborough in Gordon *v.* Swan, 2 Camp. N. P. C. 429 note.

(*f*) Mussen *v.* Price, 4 East, 147.

at

CHAP. I. at the end of three months, the action would lie for goods sold and delivered. Accordingly the plaintiff recovered, but the point was saved for the consideration of the court. A rule *nisi* having been obtained for setting aside the verdict, and entering a nonsuit, principally upon the authority of a case of Millar *v.* Shawe, at Lancaster, Lent assizes, 1801, before Chambre, J. where the plaintiff was nonsuited on a similar objection; Cockell Serjeant, Holroyd and Yates, shewed cause against the rule and contended that the contract was in substance, for the sale of the goods upon a credit of three months only, with a further credit, *upon condition*—upon the defendants' giving a good bill; that not having done so, upon the condition broken, the plaintiff might recur to his remedy of *indebitatus assumpsit* for goods sold and delivered, the consideration having failed on which he had agreed to suspend his claim; and they referred to Puckford *v.* Maxwell (*h*), and Owenson *v.* Morse (*i.*)

Topping and J. Clarke, *contra*, relied on the case of Millar *v.* Shawe, of which they read the following note, taken by a gentleman at the bar. "Action for goods "sold and delivered.—The plaintiff's evidence proved "that the goods were sold at *two months and two* "*months*, that is, to be paid for at two months by a "bill at two months; which the witness considered as "cash at four months. The action was brought before "the expiration of the four months, and the declaration "was in the usual form, containing the usual counts of "*indebitatus assumpsit* and *quantum valebant* for the "amount. Topping for the defendant contended that "no debt existed at the commencement of the action,

(*h*) 6 T. R. 52. (*i*) 7 T. R. 64.

"nor

" nor till the four months were expired; but that the " plaintiff might have brought his action after the ex- " piration of the two months, and before the end of the " four months, upon the breach of his contract for the " non-delivery to him of a bill; but that no action of " *indebitatus assumpsit* would lie till the end of the " four months. Cockell Serjeant, and Yates, contend- " ed, that as the defendant had not given the bill at the " end of the two months, they might abandon the con- " tract, and recover the price of the goods, for want of " the bill, which, if given, the plaintiff was to accept in " lieu of the money. And Chambre, J. at first seemed " to be of that opinion; but on hearing Topping for " the defendant, as above, he thought that after the " four months the plaintiff need not have declared on " the contract, but the money being then due and un- " paid, he might declare in the usual way, and recover " the price as a debt, on an *indebitatus assumpsit*. " Before that time, however, he thought the plaintiff's " only remedy was for breach of the promise in not de- " livering the bill at two months. Plaintiff nonsuited. " Cockell Serjeant, then said, that Chambre, J. had " ruled the same in another cause at a former assizes at " York." They then observed, in answer to a case put by the other side of a drawer of a bill, against whom an action lies immediately upon the dishonor of his bill, that generally there is no contract for time in such cases, but an antecedent debt from the drawer, and an *indulgence voluntarily* granted by the payee. Then upon the failure of the consideration the party is referred back to his original action.

LORD ELLENBOROUGH C. J. inclined to consider this contract as an absolute agreement for a credit of three months, with a stipulation on behalf of the defendant, that

CHAP. I. that at the end of the three months he should be at liberty to give the plaintiff a bill at two months for payment, which was to be taken for such if the condition were performed. "Whatever respect therefore (said his Lordship) I feel for the opinion which has been cited, (Mr. Justice Chambre's) the present feeling of my mind is "that this action is well brought."

GROSE, J. thought the action ought to have been brought for not giving the bill, which the defendant had undertaken to do, and not for goods sold and delivered, in which case the promise is to be implied from the circumstances of the case, but this was not the case of an implied, but of an express promise.

LAWRENCE, J. was of the same opinion. The proper ground of action is the non-performance by the defendant of his agreement with the plaintiff. The argument for the plaintiff goes upon an assumption that the giving of the bill was *a condition*, upon which the credit was to be extended beyond the three months. But I see *no condition* in the contract; there are no words of condition. The giving of the bill at two months was a term introduced into the contract for the benefit of the seller, that at the end of three months he might have in his hands an instrument which he could negotiate.

LE BLANC, J. expressed himself of the same opinion, and observed, that the cases alluded to, have been where goods have been sold, and a bill taken in payment, *payable at a future day, but without any express contract for time for the payment of the goods; and thereupon the bill being dishonoured, the drawer has been sued immediately.*

The majority of the judges therefore being of opinion that the action was not maintainable, the rule for entering a nonsuit was

Made absolute.

This

This was an action (*k*) for goods sold and delivered. At the trial before Lord Alvanley, C. J. at Guildhall, sittings after Trinity Term, 1803; it appeared that on the 10th of August 1802, the goods in question were purchased by the defendant, of the plaintiff, at Manchester, *to be paid for by a bill at two months;* that a bill was accordingly drawn upon the defendant for the amount of the goods, and tendered for acceptance on the 27th of August, which was refused, the defendant declining to accept any bill, except a bill at three months, and that not until after the goods should have arrived. The goods were delivered by the plaintiff at the common waggon office, a few days after the receipt of the order, but did not arrive in London until the 9th of October. The writ was sued out on the 6th of September. The jury found a verdict for the plaintiff; but liberty was reserved to the defendant to move that this verdict might be set aside, and a nonsuit entered.

Accordingly a rule *nisi* for that purpose was obtained, which was afterwards made absolute, upon the authority of the case of Mussen *v.* Price; and it was said by Lord Alvanley, C. J. in delivering the opinion of the court, that Mr. Justice Rooke, who had ruled that *indebitatus assumpsit* would lie in such case, was perfectly satisfied with the decision of the court of King's Bench (*l*).

But where in an action (*m*) for goods sold and delivered, it appeared, that the goods in question were originally sold at two months credit, to be paid for by a bill at twelve months; that more than fourteen months had elapsed between the delivery of the goods and the com-

(*k*) Dutton *v.* Solomonson, 3 Bos. and Pull. 582.

(*l*) See also De Symons *v.* Minchwich, 1 Esp. N. P. C. 430.

(*m*) Brooke *v.* White, 1 Bos. and Pull. N. R. 330. Heron v. Granger, 5 E[illegible] 269. Marshall v. Poole, 13 East, 98.

E mencement

CHAP. I. mencement of the action, and that the goods had not been paid for; the court held that the vendor might recover in such action, the period of credit being expired.

The general rule seems to be, that when the contract is executory, the party must declare specially, but that when it is executed he may declare generally (*n*).

So where by the contract the money is to be paid at a future day, the vendor cannot sue till that period arrives, though it was agreed he should have negociable security in the mean time, but which turns out to be useless being on a wrong stamp (*o*). But if credit be given by the vendor as a voluntary act subsequent to, and not making any part of the original contract, it may at any time be revoked (*p*); though if the vendor being entitled to demand immediate payment, take a bill payable at a future day, he cannot commence an action for the original debt until that period expires, if such bill is a valid security (*q*).

SECT. III.

Of Conditional Contracts of Sale.

CONDITIONAL Sales may seem perhaps to resolve themselves into the species of contract treated of in the last section, inasmuch as all sales upon condition may be considered as executory till the condition performed; but upon a closer view of the subject we shall find this distinction—that in the contracts which are the subject of the

(*n*) Alcorn *v.* Westbrook, 1 Wils. 115.—Weston *v.* Downes, Doug. 23.—Power *v.* Wells, Cowp. 818, and Dr. Compton's case, cited in 1 T. R. 136.

(*o*) Swears *v.* Wells, 1 Esp. N. P. C. 317.

(*p*) De Symons *v.* Minchwich, 1 Esp. N. P. C. 430.

(*q*) Stedman *v.* Gooch, 1 Esp. N. P. C. 5.

preceding

CHAP. I.

preceding section, the *contract* is complete, and the *execution* of it, only, suspended; whereas in sales on condition, the continuation of the *contract itself* depends upon the condition. Thus if a man sell goods for so much as A shall name, the contract is not complete till A names the price (*r*); though the goods are so far bound, that if A do afterwards name the price, the contract is complete; and if the vendor sell the goods between the contract and the price being ascertained, an action on the case lies against him (*s*): yet if A refuse to name the price, ~~and~~ *or* die before he has done so, the contract is absolutely void; for the sale being upon a condition precedent, no property vests in the vendee till the condition is performed. And if the condition become impossible by the act of God, or the person who was to name the price, the contract is at an end (*t*); for till the price is agreed upon, we may recollect there is no sale. But though no certain price be agreed upon when the contract is entered into, yet if the parties settle between themselves some method by which it may be ascertained at a future period, the maxim *id certum est, quod certum reddi potest*, applies, and the price when so settled shall relate to the original contract (*u*).

Upon this subject we shall find a great similarity between the civil law and the law of England; thus Justinian (*x*) reciting that it had been doubted, "*si inter aliquos* "*ita convenerit, ut quanti Titius rem æstimaverit,* "*tanti sit empta:*" whether this should be considered as a sale or not, says, "*Sed nostra decisio ita hoc con-*

(*r*) Kit. 181. a.
(*s*) Ibid.
(*t*) Co. Lit. 206. b.
(*u*) Kit. 181. a.
(*x*) Inst. l. 3. tit. 24.

CHAP. I.

" *stituit, ut quoties sic composita sit venditio, quanti*
" *ille æstimaverit, sub hac conditione staret contractus:*
" *ut si quidem ille, qui nominatus est, pretium defini-*
" *erit: tunc omnimodo secundum ejus æstimationem,*
" *& pretium persolvatur, & res tradatur, & venditio ad*
" *effectum preducatur: emptore quidam ex empto ac-*
" *tione, venditore ex venditio agente. Sin autem ille,*
" *qui nominatus est, vel noluerit, vel non potuerit pre-*
" *tium definire: tunc pro nihilo esse venditionem, quasi*
" *nullo pretio statuto.*"

So both the Roman law, (*y*) and our own (*z*) recognize sales upon condition that the thing sold pleases the vendee upon trial or view: as if A sell corn to B, upon condition that B, upon view, is satisfied with it; if B, *when he sees first the corn*, approve or disapprove of it, the bargain is complete or void; and if B afterwards change his mind, he cannot annul or affirm the contract in contradiction to his first declaration, made upon view of the corn (*a*): but if the bargain be that A shall give B ten pounds for such a wood, if he like it upon view thereof, and a day be agreed upon for viewing it; if A declare his like or dislike before the day, and yet if he agree to take it at the day, the bargain is perfect (*b*).

To this head, of conditional sales, may also be referred that species of contract where goods are delivered by one tradesman to another upon what is termed *sale or return*; that is, where a wholesale dealer delivers to a shopkeeper a quantity of goods at a certain price to be paid for (if sold by the vendee) in a specified time; but if not sold, to be returned to the vendor; this, it will be

(*y*) Inst. l. 3. tit. 24.

(*z*) Plowden, 6, b. — Noy's Max. c. 42.

(*a*) Bro. Abg. tit. Cont. 27. — 1 Roll. Abg. 449. l. 21.

(*b*) Noy's Max. c. 42. — 1 Roll. Abg. 449, l. 25.

seen,

seen, is a contract of sale which depends for its completion on the condition of the resale by the vendee, and till the condition performed, no property vests in such conditional vendee; for though it may appear, that by the delivery of the goods at a specified price, the sale was complete, and the agreement for the return a substantive independent contract, yet it cannot be considered in that light, inasmuch as the price, though fixed at the time of the delivery of the goods, is so fixed with reference to the conditional sale, and is more properly an agreement for a certain price *in futuro;* the language of such a contract is this—the wholesale dealer says—"I will deliver to you "a quantity of goods, which *if* you meet with a cus- "tomer for them, shall be considered as sold to you at "such a price."—Upon the resale then the condition is performed, and the contract for the first sale is complete. But though whilst the goods remain unsold in the hands of the conditional vendee he has no property in them (*i. e.* no absolute property; a qualified property he has certainly as bailee) yet they will pass by assignment under a commission of bankrupt against him, as goods in his possession, order, and disposition, under the stat. 21 Jac. I. c. 19, § 11. (*c*) which shews that the conditional vendee is not considered as the factor of the owner of the goods; for if so they would not have vested in the assignees under the commission (*d*): indeed there seems to be no distinction between these agreements for the delivery of goods on sale or return, and the case of riding a horse upon trial, with an understanding that, if he suits, he is to be taken at a certain price *.

(*c*) Livesay *v.* Hood, 2 Campbell, N. P. C. 83.

(*d*) Scott *v.* Surman, Willes. 400.

* Where goods are delivered upon the terms of *sale or return*, and the person receiving them does not return them in a reasonable time,

But

CHAP. I. But if goods be sold to a trader, with a proviso, that in case of bankruptcy the vendor may take them back, such a condition is void under 21 J. I. c. 18, § 11. if the goods are in the order and disposition of the bankrupt (*e*).

SECT. IV.

Of Delivery.

AS delivery and payment are inseparable incidents to all sales, they perhaps cannot be more properly arranged than in this chapter, which proposes to treat of sales in general: this section then will be devoted to the consideration of what is in law deemed a sufficient delivery of goods sold to entitle the vendor to the price.

In commenting on that branch of the statute of frauds which relates to the contract of sale, this subject was unavoidably touched on, but the decisions collected in that part of the work are only such as arose upon or out of the statute, and may therefore be considered as a distinct class of cases from those detailed in this section.

In the infinite number of transitions from hand to hand of which property is susceptible in the mercantile world, very few sales are perfected by actual delivery of the thing sold; such delivery of those bulky articles which are the subject of a very great proportion of sales amongst merchants would indeed be exceedingly inconvenient, and in many cases impossible; a method has therefore been contrived to remedy this inconvenience by substituting a *constructive* for an *actual* delivery; thus,

(*e*) Holroyd *v.* Gwynne, 2 Taunt. 176.

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the contract of sale becomes absolute, and the value of them may be recovered in an action for goods sold and delivered. Bailey *v.* Gouldsmith, Peakes' N. P. C. 56.

the

the delivery of the key of a warehouse in which the goods are lodged (*f*); or the name of the vendee being wrote, by his direction, on the article sold (*g*); the making goods up to be delivered, or otherwise separating them from a larger quantity of which they formed a part, with a view to delivery (*h*); the vendee, by the consent of the vendor, dealing with the property as his own (*i*), the vendor (after a sale) receiving warehouse rent for the thing sold; which, by the desire of the vendee, remains in the vendor's warehouse (*k*); or the request of the vendee to keep a horse, sold to him by a stable keeper, at livery, though the horse be not actually moved out of the stable (*l*), have all been construed to be evidence of a delivery, so as to enable the vendor to maintain an action of *indebitatus assumpsit* for goods sold and delivered.

So also, if a tradesman order goods to be sent by a carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser, and the property is thereby changed; thus, where goods were delivered by the vendor at a common waggon office, to be forwarded to the vendee, this is a sufficient delivery to the purchaser (*m*), *a fortiori* if delivered to a carrier named by the vendee (*n*): so delivery to a wharfinger, as where A in London (*o*), received an order from B living

(*f*) Chaplin *v.* Rogers, 1 East. 194.

(*g*) Hodson *v.* Le Bret, 1 Camp. N. P. C. 233.

(*h*) Keilw, 77, pl. 25.—Lord Loughborough in Lickbarrow *v.* Mason, 1 H. Bl. 363.

(*i*) Chaplin *v.* Rogers, *supra*.

(*k*) Hurry *v.* Mangles, 1 Camp. N. P. C. 452.

(*l*) Elmore *v.* Stone, 1 Taunt. 408.

(*m*) Dutton *v.* Solomonson, 3 Bos. and Pull. 582.

(*n*) Dawes *v.* Peck, 3 Esp. N. P. C. 14. 8 T. R. 330. S. C.—Harwood *v.* Lester, 3 Bos. and Pull. 617.

(*o*) Cooke *v.* Ludlow, 2 Bos. and Pull. N. R. 119.

CHAP. I. living near Bristol, to send goods to him by any conveyance which would reach Bristol, informing B when he sent them, that he might know when to expect them; A sent the goods to a wharf from which vessels for Bristol sailed, and informed B, as he was told at the wharf, that the goods would go by the ship Commerce; in fact, the goods were not sent by the Commerce, which happened to be fully laden, but some time after were sent by another vessel. B after the arrival of the Commerce at Bristol, without the goods, made no farther enquiry for them, and A did not know, till after he had required payment for the goods, that they had been sent by another ship, which he then communicated to B. Upon this case it was held, that the wharfinger was the agent of the vendee, and that by a delivery to him the property was changed, and the vendor entitled to the price of the goods.

So if a person abroad order goods from a merchant in London, the delivery is complete as soon as the goods are shipped: thus—

In an action on a policy of insurance upon goods (*p*) by the ship Two Friends, from London to Charleston, the defendant pleaded the general issue to all except twenty pounds fourteen shillings and six-pence, and as to that a tender.

It was admitted that the defendant had subscribed the policy for one hundred pounds, and that a loss had happened of seventy-six pounds fourteen shillings and six-pence per cent.

As a discharge for fifty-six pounds, the defendant put in the record of a cause in the Lord-Mayor's court, wherein one George Baker was the plaintiff, Eliza

(*p*) Huxham, Spr. *v.* Smith, 2 Campbell, N. P. C. 19.

Huxham

Huxham was the defendant, and Samuel Smith the garnishee. From this it appeared, that upon a judgment *quod habet*, Smith the defendant had been ordered to pay fifty-six pounds of the monies of Miss Huxham in his hands to Baker, and that this was an acknowledgment of satisfaction regularly entered. CHAP. I.

Park, for the plaintiff, contended, that the defendant was bound to prove that Baker had a debt of fifty-six pounds due to him from Miss Huxham, which arose within the city of London; and cited Palmer *v.* Hooke, 1 Lord Raymond, 727, as an authority in point.

Lord Ellenborough thought the judgment was *primâ facie* evidence that the debt arose within the city; but it being the record of an inferior court, his Lordship said he would admit proof to the contrary.

A witness then stated, that Miss Huxham was a milliner at Charleston, and had ordered goods of Baker, a shopkeeper in Newgate Street, to be delivered on board a ship in the river Thames; that they were sent according to the order; but whether the ship which received them then lay within the bounds of the city, the witness could not tell.

Lord Ellenborough, That is immaterial, there was a delivery as soon as the goods were put in a course of conveyance. The debt certainly arose within the city, and might be sued for in the Mayor's court.—And again where

The plaintiff(*q*) had shipped goods on board the Mercurius, to be carried from London to Tonningen. The goods were expressed in the bill of lading to be shipped "by order and on account of Hesse and Co. of Hamburgh."

(*q*) Brown *v.* Hodgson, 2 Campbell, N. P. C. 36.

Before

CHAP. I. Before the Mercurius arrived at Tonningen, that place was declared in a state of blockade, and she was ordered by an English frigate to return home. On her arrival in the Thames, the captain for the purpose (as alleged) of getting rid of the cargo, and setting the ships at liberty to proceed on another voyage, made an affidavit, that he believed the cargo to be Danish property. In consequence of this, the goods in question were unloaded by an order from the court of Admiralty, delivered into the custody of the Admiralty marshal, and afterwards libelled as lawful prize to his majesty. However, by a decree of the court, they were at last restored to the plaintiff. The action was brought against the defendant as owner of the Mercurius, to recover damages for the injury the goods had suffered, and the expence the plaintiff had incurred by the proceedings in the court of Admiralty.

It was objected by Park, for the defendant, that at all events, this action could not be maintained by the present plaintiff, who had no property in the goods. The bill of lading stated them to be shipped by order and on account of Hesse and Co. Therefore the property vested in these persons the moment the goods were put on board the Mercurius, and for this he cited Dawes *v.* Peck, and Dutton *v.* Solomonson.

The Attorney General, (Gibbs) *contra*, took a distinction between goods sent from one part of England to another, and goods sent from England to a foreign country. In the former case, a delivery to the carrier was a delivery to the consignee: but in the latter, the risk was still the consignor's till the goods reached their destination. If the goods arrive safe they are to be paid for, *aliter* if they do not; but *per*

LORD

Lord Ellenborough—The goods are shipped by order and on account of Hesse and Co. I can recognise no property but that recognised by the bill of lading. This action cannot be maintained.

A written order given by the vendor of goods to the purchaser, directing the person in whose care the goods are to deliver them, is a good delivery.

Action on the case (*r*) for the non-performance of a contract—plea general issue.

The case was, that the plaintiff on the 26th of September, being at the house of the defendant, the defendant told him that he had a quantity of rice to sell, but there was no evidence to prove any contract made at that time.—The plaintiff produced an order on Bennet and Co. to deliver to ~~them~~ him twenty barrels of rice, which was signed by ~~Keeves~~ the deft; and a witness proved that ~~Keeves~~ the deft had told him that he had sold twenty barrels of rice to ~~Mr. Searle~~ the plt, at 17s. *per cwt.*; and that he was a fool for selling it so soon, as the price of rice had risen.

The plaintiff then proved the delivery of the order for the rice to the warehouseman of Bennet and Co.; and that the rice not being then removed, ~~Keeves~~ the deft on the 2nd of October countermanded the delivery to ~~Searle~~ the plaintiff, who sent for it on the 10th of October following.

It was objected, that this contract was not evidenced as directed by the statute of frauds; but

Eyre, C. J. said the statute does not attach where there has been a delivery of part of the thing sold; in this case there has been a delivery of the whole. Keeves the defendant gave an order for the delivery upon Bennett and Co., in whose possession the rice then was.—The plaintiff accordingly had a verdict.

(*r*) Searle *v.* Keeves, ~~1~~ 2 Esp. N. P. C. 598. ~~and 2 Esp. 598~~

Trover

CHAP. I.

Trover for six hundred casks of butter (*s*).

The bankrupt, an Irish provision merchant, in December, 1807 bought the goods in question, which were then lying in the warehouses of the defendants, who were wharfingers in the Borough. Along with the invoice, the bankrupt received from the sellers an order to deliver the goods, which he lodged with the defendants.—The defendants thereupon transferred the goods in their books to his name, and actually debited him with warehouse rent. Immediately after the goods had been so transferred, he became insolvent, and the sellers gave the defendants notice to hold the goods on their account. A commission of bankruptcy being sued out against the bankrupt, the plaintiffs, as his assignees, demanded the goods of the defendants, but they delivered them back to the sellers.

The Attorney General for the defendants, argued that they were justified in doing so, on the ground that the seller's right to stop *in transitu* subsisted at the time of the insolvency. And that the goods remaining with the wharfingers, could not be considered as delivered to him.

Best Serjeant, *contra*, relied on Hurry *v.* Mangles.

Lord Ellenborough, C. J. "The goods having been "transferred into the name of the purchaser, it would "shake the best established principles, still to allow a "stoppage *in transitu*. *From that moment the defend-* "*ants became trustees for the purchaser, and there was* "*an executed delivery as much as if the goods had been* "*delivered into his own hands* The payment of rent "in these cases, is a circumstance to shew on whose ac- "count the goods are held; but it is immaterial here,

(*s*) Harman *v.* Anderson, 2 Campbell, N. P. C. 243.

the

" the transfer in the books being of itself decisive. I " am clearly of opinion, that the assignees are entitled " to recover."—Verdict accordingly *.

In the ensuing term, the Attorney General expressed his acquiescence in the direction of the judge at *Nisi Prius*; but moved to reduce the damages, on an affidavit, stating, that as to one parcel of the butter no transfer had been made in the defendants' books to the bankrupt, before the bankruptcy. In respect to this parcel, the facts were, that the bankrupt having received the delivery note from the vendor, sent it to the defendants, in whose warehouse the goods were lying: and that they neither made any transfer in their books to his name, nor did any thing to testify that they accepted the delivery note, or held these goods on his account.

But the court held, that after the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaser, the delivery note being sufficient, without any actual transfer being made in their books, and as between vendor and vendee, the delivery was complete: and according, a rule to shew cause was refused.

So as between the buyer and seller, the sale of a part of a large quantity of the article sold, remaining in the possession of a third person, is complete by the delivery of a note specifying the quantity sold (which is admitted by such third person, by writing and signing an accept-

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* And where a warehouseman or wharfinger makes such transfer in his books, or accepts a delivery order, he, in a manner, attorns to the vendee, and cannot afterwards contest his title. Though as between vendor and vendee, the sale may not have been perfected according to the usage of the trade.—Stonard *v.* Dunkin. 2 Campbell N. P. C. 344.

ance

CHAP. I. ance of the order) although the specific thing sold was never severed from the bulk (*t*).

But the mere act of packing goods sold, in cloths belonging to the vendee is no delivery, although earnest be paid. Thus: in an action (*u*) for goods sold and delivered, a verdict was found for the plaintiff, with liberty for the defendant to move for a new trial, or a non-suit, in case the court should be of opinion, on the report of the evidence, that the action could not be maintained.

The facts as reported by Mr. J. Ashurst were, that the plaintiff had agreed to sell a quantity of wool to the defendant, that a shilling earnest was paid to bind the bargain, that the wool was packed in cloths furnished by the defendant for the purpose; and left at a hovel belonging to the plaintiff, and that the defendant was to send his waggon in a few days to take it away. But while the defendant's servant was weighing and packing it, and proposing to the plaintiff to fix the time when the waggon should come, the plaintiff declared that, "it should not go off his premises till he had the money "for it."

The court were so clearly of opinion, that this did not amount to a delivery, that they stopped the counsel for the defendants, and made the

Rule absolute for a non-suit.

In this case, it was said by Mr. Justice Buller, that in questions of this sort, the usage of trade is resorted to, to shew whether there has been a delivery or not: as in the case of wharfs and the like.

It has been held, that where several articles were ordered at the same time, though at separate and distinct

(*t*) Whitehouse *v.* Frost, 12 East. 614.

(*u*) Goodall *v.* Skelton, 2 H. Bl. 316.

prices,

prices, and forming one gross contract, the vendor cannot by a delivery of some of the articles, entitle himself to the price of them separately, as in the case of a separate contract for each article. But if the vendee accept any one article so delivered, he thereby estops himself from contending that the contract was *entire*; and consequently he is liable to pay for such articles as are delivered (*x*).

CHAP. I.

Before we take leave of this branch of the subject, it may be proper to observe, that in all those cases where goods are delivered to wharfingers, carriers, &c. where it is said, the delivery is complete, and the property changed, it must be understood, however, to be subject to the vendor's right to stop *in transitu—aliter*, where the goods have actually come to the hands of the vendee, as we shall see when we come to treat of stoppage *in transitu*.

SECT. V.

Of Payment.

IT has already been observed, that where no time for payment is specified in the contract of sale, the money is demandable immediately upon the delivery of the goods (*y*); but where one agrees to deliver certain goods at a certain price in a limited time, he cannot demand payment till the *whole* of the goods are delivered—as where it (*z*) appeared, that on the 10th of September, 1804, A agreed with B to sell him one hundred bags of Kent hops, merchantable, of the growth of 1804,

(*x*) Champion *v.* Short.—1 Campb. 53. and *see* Waddington *v.* Oliver.—2 Bos. and Pull. N. R. 61.

(*y*) Page 3.

(*z*) Waddington *v.* Oliver.—*supra.*

at

CHAP. I. at fifty six shillings *per cwt.*, to be delivered on or before the 1st of January, 1805, as it might be agreeable to the plaintiff. That on the 12th of December twelve bags were delivered, and on the same day, or the next payment thereof was demanded, which being refused, a writ was sued out on the 13th of December. In an action for goods sold and delivered, brought to recover the price of these twelve bags, tried before Sir James Mansfield, C. J. at the Guildhall sittings after Trinity Term, 1805, the plaintiff was non-suited, his Lordship being of opinion, that the plaintiff having agreed to deliver one hundred bags of hops by a particular day, was not entitled to bring an action upon delivery of a part of the goods.

It was moved to set aside the non-suit on the ground that as the plaintiff was at liberty to deliver the hops at such times as he pleased before the 1st of January, and as no time was stipulated for payment, the defendant was bound to pay for them as they were delivered.

The court, however, were clearly of opinion, that the contract was entire, and could not be split, and that the plaintiff therefore had no right to bring an action until the whole quantity was delivered, or until the time for delivering the whole had arrived.

And it has been held no waiver of the vendor's right to be paid for goods on delivery, that he allowed the purchaser to carry away a part of the goods without being paid for them; as where it appeared (*a*) that wood had been sold, to be paid for on delivery by a bill at two months; that the defendants had permitted the plaintiff to carry away a part of it, without receiving any bill; but that he had refused to let him have the remainder,

(*a*) Payne *v.* Shadbolt.—1 Campbell N. P. C. 427.

till

till it should be paid for according to the terms of the contract. It was held, that this was only a dispensation *pro tanto*, and that the vendor was entitled at any time to stand on his right to be paid according to the contract. CHAP. I.

We have seen that where a person takes a bill of exchange or check upon a banker, payable at a future day, in payment for goods sold, that he cannot sue for the price of his goods until the expiration of the time which such bill or check has to run, unless it turn out that such security was good for nothing: it therefore becomes necessary for us to consider in what cases such bill or check is to be considered as a payment, or when the party is at liberty to treat it as a nullity, and sue for his debt in an action for goods sold and delivered.

When the bill, note, or check is ascertained to be a void or invalid security, it is not considered as a payment, and consequently the vendor may resort to his original debt: (that is, where the security was accepted as an indulgence to the vendee, and not in consequence of a contract for credit at the time of the sale, in which case we may remember the vendor must wait until the time of the credit expires, even though the bill agreed to be given in the mean time proves to be waste paper (*b*).)

This (*c*) was an action of *assumpsit* for goods sold and delivered. The defence relied upon by the defendant was, that the plaintiff in discharge of the bill, which was for millinery goods furnished to the defendant, had taken three promissory notes of one Finlay, payable at the house of a Mr. Browne, and had given the defend-

(*b*) Ante 50. N. P. C. 3.
(*c*) Stedman *v.* Gooch, 1 Esp.

CHAP. I.

ant a receipt to that effect; the notes had been sent to Browne, and he was applied to respecting the payment; in answer to that application he said he knew Finlay, but that he had no effects of his in his hands; nor could he pay the notes unless he had; the notes were thereupon returned in a letter to Finlay, informing him that they were so returned as not being likely to be paid.

Upon this case being made, it was objected by the counsel for the defendant, that it appeared the notes had been returned before they were payable; and that the plaintiff having taken them in discharge of his debt, for goods sold, could not maintain an action on his original debt, until an actual default in the payment of these notes when they became due; and that the plaintiff should not be allowed to judge of the probable or improbable ability of the party to pay at a future day.—But Lord Kenyon over-ruled the objection. He said, that to this effect the law was clear, that if in payment of a debt, the creditor is content to take a bill or note, payable at a future day, that he cannot legally commence an action on his original debt, until such bill or note becomes payable, or default is made in the payment: but then, if such bill or note is of no value, as if for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor on it.

So where the bill becomes of no value from the insolvency of the drawee, as in the following case.

This (*d*) was an action of *assumpsit* for goods sold and delivered, the evidence of the plaintiffs below was to the

(*d*) Brown *v.* Kewley in error in Cam. Scacc.—2 Bos. and Pull. 518.

following

following effect: that on the 19th of January, 1793, Kewley and Co. who were merchants at Liverpool, by Messrs. Grieves and Dennison, their brokers, sold and delivered to G and H. Brown, who were also merchants at Liverpool, forty two hogsheads of coffee, to be paid for in two months, by a bill at two months' date; that this coffee was purchased by G. and H. Brown on the joint account of themselves, and J. P. Richard, also a merchant in Liverpool; that on the 7th of February, 1793, G. and H. Brown on behalf of themselves and and J. P. Richard, delivered to Kewley and Co. a check on Caldwell and Co. bankers at Liverpool, directing them, two months after date, to pay to Kewley and Co. a bill at two months for the amount of the goods, which check was indorsed by the plaintiffs below, and paid by them into the banking-house of Caldwell and Co., who entered it short in the account of Kewley and Co; that G. and H. Brown on their partnership account, and J. P. Richard on his own account, and Kewley and Co. on their partnership account, respectively dealt with Caldwell and Co. as bankers, and that the general course of business between Caldwell and Co. and most of their customers, was to settle accounts on certain quarterly days; when they advanced bills for their customers, or received bills for them, they entered the whole amount in their books as bills: but on the quarterly days, they debited their customers with the whole amount of bills advanced to or for them, crediting them at the same time for interest from such day to the day when the bills would become due, and crediting their customers for the whole amount of bills paid in by them, debiting them for the interest in like manner, and when a check was paid in for a bill to be drawn at a future day, they calculated and allowed interest on the next quarterly day,

CHAP. I.

CHAP. I.

to the time when such bill, if drawn, would become payable; that the account between Kewley and Co. and Caldwell and Co. had been settled only six times between May, 1798, and March, 1793: but that each of those settlements took place on a quarterly day; that on the 18th of March, 1793, Caldwell and Co. became bankrupts, a quarterly day having intervened between the payment of the check into the house of Caldwell and Co, and their bankruptcy, upon which last quarterly day no settlement of accounts between Kewley and Co. and Caldwell and Co. took place, nor was the amount of the check ever carried out as cash, or any calculation of interest made thereon till after the bankruptcy; that when the check was paid into the banking house of Caldwell and Co. there was a balance of fifty one pounds eleven shillings in favour of Kewley and Co, which was much overdrawn before the bankruptcy of Caldwell and Co. without any other addition to the credit side of the account than the check in question.—Upon this evidence the learned judge (Heath) who tried the cause, held that the delivery of the check to Kewley and Co, and their receipt of the same, and the indorsement over to Caldwell and Co. was not a legal payment or satisfaction; the plaintiffs below accordingly had a verdict, whereupon a bill of exceptions was tendered, and afterwards sealed by the learned Judge.

One of the errors assigned was, upon this direction given to the jury; but the court of error, after hearing the case fully argued, and taking time to consider their judgment, affirmed the judgment below.

Where a bill or check is given in payment, and afterwards lost by the ~~payee~~ indorser, such bill or check will be so far considered as a payment, as to protect the vendee from any action for the value of the thing sold, where the vendor

dor refuses to indemnify the vendee against his liability on the bill or check (*e*). And it would seem that the same rule would prevail, even had the vendor offered sufficient and unexceptionable indemnity, if the bill or check be indorsed, or payable to bearer (*f*).

And if a debtor is directed by his creditor to remit money by the post and it is lost, the creditor must bear the loss (*g*): but in such cases, the person remitting should deliver the letter at the post office, and not to a bell-man in the street (*h*).

Upon the question whether interest ought to be allowed upon a demand for goods sold and delivered, there seems to be a conflict of authorities. In Pincock *v.* Willet (*i*), which was an action for goods sold and delivered, the sheriffs' jury, upon the execution of a writ of inquiry, allowed the plaintiff six pounds five shillings interest.—Upon a motion to set aside the inquisition, the court were of opinion, that interest could not be allowed in any case, except upon promissory notes and bills of exchange, and would have set aside the inquisition—it was agreed to remit the six pounds five shillings, to save the expence of a new inquiry. So in Blaney *v.* Henrick (*j*), it was said by Gould, Blackstone, and Nares Justices, "that for money owing for goods sold and delivered, no interest shall be allowed." But it would seem from the report in Blackstone, that this opinion was grounded upon the circumstance of such debts not being liquidated, till the jury find the value.—In Eddowes *v.* Hopkins (*k*) also, it was admitted by Lord Mansfield,

(*e*) Bevan *v.* Hill.—2 Campbell, N. P. C. 381.

(*f*) Pierson *v.* Hutchinson, ibid. 211. 6 Esp. 126. S. C.

(*g*) Warwick *v.* Noakes, Peake's C. N. P. 67.

(*h*) Hawkins *v.* Rutt. ibid. 186.

(*i*) 1. Barnes' Notes, 151.

(*j*) 2 Black. Rep. 761.—3 Wils. 205. S. C.

(*k*) Dougl. 376.

C. J.

CHAP. I. C. J. that by the common law, book-debts do not, of of course, carry interest; but subsequently, in an action for goods bargained and sold (*l*), at a limited credit, the Court of Common Pleas refused to set aside a verdict, which included interest on the sum demanded, from the time at which the money ought to have been paid, according to the terms of the contract. In future, however we may hope to find the decision upon this branch of the law more in unison, as the present learned Chief Justice of the King's Bench, has laid it down as a general rule, "that interest ought to be allowed only in "cases where there is a contract for the payment of "money on a certain day, as on bills of exchange, pro-"missory notes, &c.; or where there has been an ex-"press promise to pay interest; or where from the course "of dealing between the parties, it may be inferred, "that this was their intention; or where it can be proved "that the money has been used, and interest has been "actually made (*m*);" and what is here said as to payment to be made on a day certain, must be understood to refer to written contracts only, such as bills of exchange, &c. consequently interest ought not to be allowed in an action for goods sold and delivered, to be paid for at a certain day; thus, where goods were sold by the following contract (*n*): London, 9th of Septem-"ber, 1808.—Sold for account of Messrs. Gordon and "Murphy,—To Swan, Anderson and Co, about one "hundred and fifty tons of Spanish copper, at eighty "four pounds *per* ton, to be received in fourteen days; "*payable at six months.*"—The question was, whether interest ought to be allowed from the expiration of the

(*l*) Mountford *v.* Willes.—2 Bos. and Pull. 337.

(*m*) De Haviland *v.* Bowerbank-1 Campbell, N. P. C. 51.

(*n*) Gordon *v.* Swan.—2 Campbell, N. P. C. 429. note.--12 East. 419. S. C.

six

six months for which the credit was given? The under-sheriff on the execution of a writ of inquiry directed the jury that they could not give interest; a rule *nisi* to set aside the inquisition on account of a mis-direction of the under-sheriff was moved for by Taddy, who relied on De Haviland *v.* Bowerbank, and Mountford *v.* Willis. But Lord Ellenborough, C. J. observed, that if interest was allowed in this case, it must be allowed in almost every action for goods sold; as it generally happens, that either by the usage of trade, or by express stipulation between the parties, credit is given for a specific time; and that what he said in De Haviland *v.* Bowerbank must be taken to refer to written instruments, such as promissory notes, and bills of exchange, which are there put as examples.

Rule refused.

From the rule in De Haviland *v.* Bowerbank, it would seem as if interest ought not to be allowed in an action for not giving a bill of exchange in payment for goods sold from the time when the bill, if given, would have become due, for this is a mere breach of contract, for which the party injured may maintain an action for damages in their nature unliquidated. And so far from being a contract expressed or implied to pay interest, the foundation of the action is the refusal of the defendant to enter into such a contract, by giving the bill. In Waddington *v.* Bristow (*o*), the Court of King's Bench refused to allow interest in an action for not performing a contract. But in a late case (*p*), which was an action for not giving a bill of exchange, pursuant to the terms of a contract of sale, in which the defendant suffered

(*o*) 2 Bos. and Pull. N. R. 360.

(*p*) Becher *v.* Jones (in error) Exchequer Chamber, 26th of May, 1810. 2 Camp. 428 n. and see App. pp. 311, 12.

judgment

CHAP. I. judgment by default; after a writ of inquiry executed, a writ of error was brought, on which the judgment below was affirmed. Upon which application was made to the court of error, that it might be referred to the officer, to compute interest upon the final judgment, from the time of the service of the allowance of the writ of error to the affirmance of the judgment, and that the same might be added to the damages. Sir James Mansfield said, that if the bill had been given, interest must have been paid pending the writ of error, and it would be unjust that the defendant below should be placed in a better situation by not performing his contract.—The rule was granted.

So where goods are sold and delivered upon an agreement by the vendee, to pay for them by *a bill* at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods, upon the common count for goods sold and delivered (*q*).

Where a bill of exchange or note is given as a security for money, we have seen that interest is payable from the time it becomes due. So if a man give such security, though void in point of law, (as a security,) yet the giving of such bill or note shews, that upon the loan, *the intention and agreement of the parties* was, that the money should carry interest, if not repaid within the limited time.—The contract remains good, though the *security* is void (*r*).

(*q*) Marshall *v.* Poole.—13 East. 98. See Supp. 311.

(*r*) Robinson *v.* Bland.—2 Burr. 1085.

So

So where from the usage of a particular trade the intention of the parties, that a book-debt shall bear interest, can be collected, interest will be allowed (*s*).

Where debts carry interest, the jury are now directed to give interest in damages, up to the day on which judgement may be signed (*t*).

If a promissory note be payable by instalments, with a condition, that if default be made in any of the payments, the whole sum is to become due, interest upon the whole is recoverable from the first default (*u*), and in such an action, if the plaintiff merely state in his particular, that the action is brought to recover the amount of the note, interest is recoverable, as incidental to the principal, though not claimed in the particular (*x*)

(*s*) Eddowes *v.* Hopkins.—Doug. 376.

(*t*) Frith *v.* Leroux. - 2 T. R. 58.

(*u*) Blake *v.* Lawrence, 4 Esp. N. P. C. 147.

(*x*) Ibid.

CHAP-

CHAPTER THE SECOND.

OF THE PARTIES TO THE CONTRACT

CHAP. II.

IT is generally true, that, by the law of England, every person *sui juris*, of full age, and sane memory, may make a binding contract (*a*); and that though the party be a leper, removed by the King's writ *a societate hominum*, or deaf, dumb, or blind; if he have understanding and sound memory (*b*.)

But as every contract entered into with persons in the cases excepted, is not *ipso facto* void; the degree of obligation arising from contracts made with persons of a limited capacity to contract, and in what cases such contracts are absolutely void, will be considered in the first section of this chapter—the second and third sections will be appropriated to contracts made by one of several partners on behalf of the firm, and contracts made by agents, &c.

SECT. I.

Of Sales by and to Femes-covert, Infants, &c.

THE persons of whose contracts we are about to treat under this division of the subject may be classed as follows: 1. Femes-covert—2. Persons insensible—3. Persons under duress—4. Ideots and Lunatics—5. Infants—6. Persons attainted, &c.—7. Aliens.

(*a*) Co. lit. 42. b. (*b*) Ibid.

1. As

1. As to *femes-covert:* By the civil law (*c*) the husband and wife were considered as persons capable of distinct and separate rights; and of making separate contracts; and might sue each other as independent individuals—but by the law of England the husband and wife are looked upon as one person (*d*); and the legal existence of the wife is to all civil purposes merged in that of the husband; and consequently, generally speaking, any contract with her is *absolutely void* (*e*). But though a married woman is not personally liable upon her contract, yet she may contract as the agent of her husband; but she cannot buy goods, &c. without the assent of her husband, so as to charge him with the payment (*f*); yet if the goods come to the use of the husband, or his family, with his knowledge, he shall be charged (*g*); as if they are brought to his house, and used there (*h*); or if the wife be generally allowed by the husband to be housekeeper, or buy for him (*i*); or buy necessary apparel for herself (*k*); or necessaries for herself and family, when her husband is beyond sea (*l*); or goods to carry on a trade conducted by her during her cohabitation with the husband: in all these cases the consent of the husband is presumed, and the contract is with him through the agency of the wife (*m*); and therefore if the husband dissent from such acts of the wife beforehand no such presumption can

(*c*) Cod. l. 4. tit. 14. 1.—and see the 10th, 18th, and 19th, Orations of Quintilian.

(*d*) Co. Lit. 112.

(*e*) Perk. § 154.—Manby *v.* Scott, 1 Sid. 120.

(*f*) Earl of Derby's case.—2 Leon, 42.

(*g*) 1 Roll. Abg. 350. E.

(*h*) Manby *v.* Scott, *supra.*

(*i*) Ibid.

(*k*) 1 Roll. Abg. 351.

(*l*) Manby *v.* Scott, *supra.*

(*m*) Etherington *v.* Parrot.—2 Lord Raym. 1006.—1 Salk. 118, S. C.

arise,

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arise, and consequently he is not liable on contracts made with her (*n*). But if a husband turn away his wife he gives her credit wherever she goes, and must pay for necessaries for her, though he give notice to persons not to trust her (*o*); but it is otherwise if she elope from the husband (*p*). And if she elope with an adulterer, the husband is not liable, even for necessaries, though the vendor had no notice (*q*); but if after the elopement of the wife, not in an adulterous manner, the husband refuse to receive her again, his liability revives (*r*); and the husband is liable for necessaries for his wife, though she has separate property, if they cohabit (*s*); but it has been said, that if the wife purchase clothes apparently beyond the quality of the husband, he is not liable (*t*); when, however, a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is in general liable only for such necessaries as from his situation in life it is his duty to supply to her. But even were they parted, if the husband has any controul over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them, or cause them to be returned, he adopts her act, and renders himself responsible. Again, however

(*n*) Ibid, and Manby *v.* Scott, 1 Sid. 127, 128, and 1 Leo. 5. S. C.

(*o*) Etherington *v.* Parrot, *supra*, and Boltons *v.* Prentice, 2 Stra. 1214.—Harris *v.* Morris, 4 Esp. N. P. C. 41.

(*p*) Manby *v.* Scott, Etherington *v.* Parrott, *ante*, and Child *v.* Hardyman, Stra. 875.

(*q*) Morris *v.* Martin, Stra. 647, and Mainwarring *v.* Sands, Stra. 706.

(*r*) Child *v.* Hardyman, *supra*.

(*s*) Thompson *v.* Hervy, 4 Burr. 2177.

(*t*) *Per* Treby in Morton *v.* Withers, Skin. 349.

low a man's circumstances may be, if he allows his wife to assume an appearance which he is unable to support, he is answerable for the consequences. When a tradesman is thereby deceived the loss must fall upon him who connived at the deception. Whatever may be the husband's degree, he sends his wife into the world with a credit corresponding to the rank in life in which, by his sanction, she affects to be placed (*u*). However it is the duty of a tradesman to make enquiries before trusting a married woman who is a stranger to him (*x*). If a man marries a woman, and holds her out to the world as his wife, he does not discharge himself from his liability for necessaries supplied to her, by proving a previous marriage between himself and another woman still alive; unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessaries to the second wife (*y*).

But to the general rule, that a married woman cannot bind herself personally, by her contract, there are many exceptions; as when the husband has abjured the realm, or is banished (*z*); or be transported for a limited period (*a*); or where the husband who has been transported does not return, the term of his exile being expired (*b*); in such cases the wife may contract as a *feme-sole*. So if the husband (a foreigner) reside abroad, and the wife trade and obtain credit in this country as a *feme-sole*, she may be sued as such (*c*). And in a subsequent case, where the husband was a foreigner, and had gone

(*u*) Waithman *v.* Wakefield, Esq. 1 Campb. N. P. C. 121.

(*x*) Ibid 122.

(*y*) Robinson *v.* Nahon, 1 Campb. N. P. C. 245.

(*z*) Co. Lit. 133. a.—Deerley *v.* Duchess of Mazarine, 1 Salk. 116.—Jewson *v.* Read, Lofft. 134.

(*a*) Sparrow *v.* Carruthers, cited in 2 Bl. 1197.

(*b*) Carrol *v.* Blencow, 4 Esp. N. P. C. 27.

(*c*) De Gaillon *v.* L'Aigle, 1 Bos. and Pull. 8-357.

abroad,

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abroad, leaving his wife in England, she was held liable for debts contracted here, though she was not separated from her husband (otherwise than by his necessary absense on the continent) had no separate maintenance, and had never represented herself as a single woman (*d*); but the case is different if the husband be an Englishman, who may be presumed to have *animus revertendi* (*e*); but that presumption may be rebutted by circumstances which shew that he has quitted the country without any idea of returning; in which case the wife would be liable, as we have seen, on the old principle of the common law, as where the husband has abjured the realm. Thus: where an Englishman had been employed in the service of the British government in a foreign country, and had lands there, and in consequence of a war between the two countries, and the cessation of his employment, sent his wife and family home, but continued to reside abroad himself. It was held that the wife, not having represented herself as a *feme sole*, was not liable to be sued as such (*f*). It was formerly held, that if a *feme-covert* lived apart from her husband, and had a separate maintenance, she might contract and be sued as a *feme-sole* (*g*), if such separate maintenance was a *fixed and permanent* allowance (*h*); but it is now decided, that a man and his wife cannot by agreement between themselves change their legal capacities and characters, and that a woman cannot be sued as a *feme-sole* while the

(*d*) Burfield *v.* Duchesse de Pienne, 2 Bos. and Pull. N. R. 380.—Walford *v.* the same defendant, 2 Esp. N. P. C. 554, and Franks *v.* same, ibid 587.

(*e*) Farrer *v.* Countess of Granard, 1 Bos. and Pull. N. N. 80, and see Mac Namera *v.* Fisher, 3 Esp. N. P. C. 18.

(*f*) Marsh *v.* Hutchinson, 2 Bos. and Pull. 226.

(*g*) Corbett *v.* Poelnitz, 1, T. R. 5.

(*h*) Gilchrist *v.* Brown, 4 T. R. 766, and Ellah *v.* Leigh, 5 T. R. 679.

relation

relation of marriage subsists, and the husband is in this kingdom, or abroad with an intention of returning; and that consequently any deed of separation, though securing the wife an ample allowance, is at law a mere nullity, though a court of equity might enforce payment of the wife's debts out of such separate fund (*i*). And it seems that a woman living apart from her husband *in a state of adultery*, is liable on her own contracts, though she has no separate maintenance (*k*); but notwithstanding the wife has committed adultery, even though the husband separate himself from her, if he allows her to continue in the house which he had occupied, together with his children, and she bears his name, he will be liable for necessaries furnished to her; unless it is proved that the tradesman with whom she dealt knew, or might have known, the circumstance of the separation, and that the wife was living in adultery (*l*).

By the custom of London, if a *feme-covert*, the wife of a freeman, trade by herself in a trade with which her husband does not intermeddle, she may sue and be sued on her contracts as a *feme-sole*; and the husband shall be named only for conformity; and if judgment be given against them, she only shall be taken in execution (*m*).

But actions upon such contracts must be brought in the city courts (*n*).

The Queen consort also may contract as a *feme-sole*, and sue and be sued alone (*o*).

(*i*) Marshall *v.* Rutton, 8 T. R. 545.—Ewers *v.* Hutton, 3 Esp. N. P. C. 255.

(*k*) Cox *v.* Kitchin, 1 Bos. and Pull. 338.

(*l*) Norton *v.* Fazan, ibid, 226.

(*m*) Langham *v.* Bewett, Cro. Car. 69.—Hetley 9.—Litt. Rep. 61. S. C.

(*n*) Caudell *v.* Shaw, 4 T. R. 361.

(*o*) Co. Lit. 133. a.

But

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But notwithstanding this unity of person and rights which the law annexes to the marriage state; the courts of equity adopt the principle of the civil law, and will entertain suits against a *feme-covert* in respect of her separate property; and will also give relief to her against her husband, or *vice versâ* (*p*); so too in the ecclesiastical courts (*q*).

2. Persons insensible, or labouring under an unhappy deprivation of the use of those organs, by which men are made acquainted with the ideas of others, and communicate their own; as a man born deaf, dumb, and blind (*r*); it is almost needless to say such a person can make no contract.

3. If a man by duress of imprisonment, or by threats, and fear of bodily harm, make a bill of sale, or other disposition of his goods, it would seem that the contract made under such constraint is voidable (*s*); but it will remain valid till avoided by the party injured; for this case is different from that of a person having no capacity to contract, whose act is merely void, but in this case the contract is the voluntary act of the party, done in the exercise of his discretion, which resolves him to submit to the less evil; though the exercise of his free-will is restrained.

4. So also the contracts of idiots and lunatics may be avoided (*t*) either during the continuance of their idiocy or lunacy, by the King; or after their restoration to their perfect mind by themselves (*u*).

(*p*) Newsome *v.* Bowyer, 3 P. Wms. 37, 38.—Prec. in Chan. 24.

(*q*) 2 Roll. Ab. 298.

(*r*) Perk. Grant. 25.

(*s*) 1 Roll. Abg. 687-2.—2 Inst. 482-3. and see Fulbeck's Par. dial. 3. p. 15. and Ff. lib. 4. tit. 6. l. 3.—Bracton, l. 3. 100 b.

(*t*) See Bracton, l. 3. 100. a.—Beverley's case, 4 Rep. 123.

(*u*) Bull. N. P. 168.

5. The

5. The case of contracts made by infants is somewhat different. It is generally true that an infant cannot make a contract that will bind him; yet for necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards, he may bind himself (*x*). As to the power of an infant to dispose of his property, it is said, that all such gifts, grants, or deeds made by infants, which *do not take effect by delivery of his hand*, are void; but all gifts, grants or deeds, made by infants by matter in deed or in writing, which do take effect by delivery of his hand, are *voidable*, by himself, by his heirs, and by those who have his estate (*y*). thus if an infant deliver a lease, or a sum of money, with his own hands, this is only *voidable*; but if an infant agree to give a horse, and does not deliver the horse with his own hand; and the donee takes the horse by by force of the gift, the infant shall have an action of trespass, for the grant was merely void (*z*). And as an infant is not bound by his contract, if one deliver goods to him upon a contract, knowing him to be an infant, he is not answerable in trover, or any other action for them; therefore such delivery is a gift to the infant. But if an infant without any contract wilfully take away the goods of another, trover lies against him; and so, it is said, if he take the goods under pretence that he is of age (*a*). Thus it appears that an infant is chargeable for a tort; but a plaintiff cannot convert an action founded on a contract into a tort, for the purpose of

(*x*) Co. Lit. 172, a--Doc. and Stu. dial. 2, c. 28.—Pickering *v.* Gunning, Palm. 528.

(*y*) Perk. § 12.

(*z*) *Per* Green in Daniel *v.* Uply, Latch. 10—1 Roll. Ab. 730, and *per* Hyde, J. in Manby *v.* Scott, 1 Mod. 137.

(*a*) Manby *v.* Scott, 1 Sid. 129, Johnson *v.* Pie, 1 Lev. 169.

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charging him. Therefore when in an action against an ~~action against an~~ infant, the plaintiff declared, that at the defendant's request, he had delivered a mare to him, to be moderately ridden, and that the defendant maliciously intending, &c. wrongfully and injuriously rode the said mare so that she was damaged, &c. it was held that infancy might be pleaded in bar, the action being founded on a contract (*b*).

It is laid down as a general rule, that infancy is a personal privilege, of which no one can take advantage but the infant himself; and that therefore though the contract of the infant be voidable, yet it shall bind the person of full age; for being an indulgence which the law allows infants, to protect and secure them from the fraud and imposition of others, it can only be intended for their benefit, and it is not to be extended to persons of years of discretion, who are presumed to act with sufficient caution (*c*). But it seems that if an infant enter into a contract which is obviously for his benefit at the time, it shall bind him (*d*).

It has already been observed, that an infant is bound by his contract for necessaries; but such things only as are suitable to the *real circumstances* of the infant are to be deemed necessaries, and therefore where in

Assumpsit for a taylor's bill (*e*), the defendant pleaded infancy, to which the plaintiff replied, that the cloaths furnished were necessary for him. The case was shortly

(*b*) Jennings *v.* Rundall, 8 T. R. 335.

(*c*) Smith *v.* Bowin, 1 Mod. 25.—Holt *v.* Ward Clarencieux, 2 Stra. 939.

(*d*) Lloyd *v.* Gregory, Cro. Car. 502.—Drury *v.* Drury, 5 Bro. Parl. Cas. 570, and Maddon *v.* White, 2 T. R. 161.

(*e*) Ford *v.* Fothergill, 1 Esp. N. P. C. 211. — Peake's, N. P. C. 229, S. C. and see Ive *v.* Chester, Cro. Jac. 560, Palm. 361, S. C.

this;

this: The defendant being under age, came to the house of the plaintiff, in company with a man of rank, who was previously his customer, and ordered the cloaths, which were to be sent to a coffee-house. It was proved, that at the time of this order the defendant was provided by his father with all things necessary for his support, and that his father had paid debts to a large amount contracted with other taylors. It was contended, that as the defendant *appeared* as a man of fortune and figure, whereby the plaintiff was induced to *think* the articles supplied necessaries corresponding with his state and degree, the infant was bound; but Lord Kenyon ruled otherwise, and he said, "that nothing was clearer in the law, "than that an infant cannot contract a debt except "for necessaries."—"As to the plaintiff not knowing "his fortune, it was no excuse; it was incumbent on "him to inquire into that, and prove it to the jury."

But though the rank of the infant is to be considered, in judging what are necessaries, yet, it seems that whatever may be the infant's rank in life, for expensive and extravagant dresses, more than absolutely necessary to enable him to appear suitably to his quality, he is not bound: as where in debt upon contract for apparel (*f*), it appeared, that part of the demand was for fustian suits, and part for velvet and satin suits laced with gold, amounting to forty-four pounds. To a plea of infancy, the plaintiff replied, that the defendant was one of the gentlemen of the chamber to the Earl of Essex, and so the apparel was necessary. But the court held, that such suits of velvet and satin were not necessary for an infant, although he was a gentleman, &c.

(*f*) Mackarel *v.* Bachelor, Withipool, Latch. 21, S. P. Cro. Eliz. 583, and see Stone *v.*

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So where in an action of goods sold and delivered (*g*); it appeared that the goods in question were a livery for the defendant's servant, he being a captain in the army, and cockades for some of the soldiers belonging to his company. The only question was, if these articles were necessaries? Lord Kenyon, C. J. held, that the cockades could not be considered as necessaries; but as to the livery, he could not say that it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery; and his Lordship said, "The general rule is clear, that infants "are liable for necessaries according to their degree and "station in life. The defendant was placed in a situation "which required such an attendant. Therefore, how-"ever inclined I am in general to protect infants against "improvident contracts, I think that this case falls within "the fair liability which the law imposes on infants of "being bound for necessaries, which is a relative term "according to their station in life."

Regimentals furnished to an infant, who is a member of a volunteer corps, are necessaries (*h*).

So necessaries for an infant's wife are necessaries for him; but if provided in order to the marriage, he is not chargeable, though she use them (*i*.)

But in no case can an infant, who lives with, and is properly maintained by his parent, bind himself even for necessaries (*k*).

Neither can an infant be chargeable with goods sold to

(*g*) Hands *v.* Slaney, 8 T. R. 578.

(*h*) Coates *v.* Wilson, 5 Esp. N. P. C. 152.

(*i*) Turner *v.* Trisby, 1 Stra. 168.

(*k*) Bainbridge *v.* Pickering, 2 Bl. Rep. 1325.

him

him to sell again in the way of trade; for it is not neces- CHAP. II.
sary that an infant should carry on a trade (*l*).

But although an infant shall be liable for necessaries, yet if he enter into an obligation with a penalty for the payment thereof, this shall not bind him; for the entering into a penalty can be of no advantage to the infant (*m*): and it was formerly considered that an infant could not make any contract, even for necessaries, *in a sum certain;* and that should an infant promise to give an unreasonable price for necessaries, that could not bind him; and that therefore the contract of an infant for necessaries, *quatenus* a contract, did not bind him any more than his bond would; but that the law allowed a reasonable price to those who furnished an infant with necessaries (*n*): but notwithstanding this, it has been adjudged, that if an infant give *a single bill* for necessaries, he shall be bound by it (*o*): from which it should seem that an infant may also be charged upon a promissory note given for necessaries, *at the suit of the payee* *: but an infant is not liable as acceptor of a bill of exchange, though given for necessaries (*p*); or indeed upon any other *negociable* instrument. Neither is an infant

(*l*) Wittingham *v.* Hill, 1 Roll. Abg. 729, Cro. Jac. 494, 2 Roll. Rep. 45, S. C.--Whywall *v.* Champion, 2 Stra. 1083.—Dilk *v.* Keighley, 1 Esp. N. P. C. 480.

(*m*) Cupworth's case, 1 Roll. Abg. 729.--Co. Lit. 172, a.--Ayliff *v.* Archdale, Cro. Eliz. 920.—Delavel *v.* Clare, Noy 85.

(*n*) Cases in Law and Eq. 185.

(*o*) 1 Roll. Abg. 729.—Ayliff *v.* Archdale, *supra.* — Russel *v.* Lee, 1 Lev. 86-7.

(*p*) Williams *v.* Harrison, 3 Salk. 197, Carth. 160. S. *S.*— Williamson *v.* Watts, 1 Campb. 562.

* *Sed quære, vide* Wood *v.* Witherick, Latch. 169, and Trueman *v.* Hurst, 1 T. R. 40.

liable

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liable upon an account stated, though all the items in the account are necessaries, for the law, contemplating the infant's want of discretion, will not subject him to the risk of false accounts (*q*).

But though an infant is liable for necessaries, yet if he borrow money to buy necessaries, he is not liable to an action for money lent; although the money was actually expended in the purchase of necessaries; for the contract here arises upon the lending, which was a contract that an infant could not enter into; and the subsequent application of the money makes no difference (*r*). But under such circumstances the infant would be liable in equity: the Courts of Equity holding, that in such cases the lender of the money stands in the place of the person paid, *i. e.* the creditor for necessaries, and shall recover in equity, as the other would at law (*s*).

But if an infant borrow money to purchase goods (though not necessaries), and after he comes of age expressly promises to pay, such promise shall bind him: though it has been held that where an infant had bought goods not necessaries, and before the day of payment died, forbearance to sue the executor of the infant upon this contract was not a good consideration to support an assumpsit, the contract with the infant being merely void (*t*); for if the infant die before he is in a situation to confirm the contract, which therefore is void at his death, no forbearance to the executor could be a ground to charge

(*q*) Wood *v.* Witherick, Latch. 169, Noy. 87, S. C.—Trueman *v.* Hurst, 1 T. R. 40, and Bartlett *v.* Emery, ibid, 42. note.

(*r*) Darby *v.* Boucher, 1 Salk. 279.—Earl *v.* Peale, 1 Salk. 386, 10 Mod. 67. S. C.—Probart *v.* Knouth, 2 Esp. N. P. C, 472. n.

(*s*) Marlow *v.* Pitfield, 1 P. Wms. 558,

(*t*) Stone *v.* Wythipoll, Cro. Eliz. 126, Latch. 21. S. C.

him

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him; but if the infant live till he come of age, and then promise to pay, this will be binding both on him and his executor; for though the law considers the contract of an infant void, whence it would seem, that it never could be a good consideration for a subsequent promise, yet as it is so considered for the benefit of the infant only, and to prevent him from being imposed upon during his minority, if the bargain is considered by him, after he shall have arrived at that age when the law supposes him capable of judging for himself, to be fair and honest, he is bound in honour and conscience to perform it on his part; and it is laid down that a *moral obligation is a good consideration for an express promise* (*u*): and therefore if he choose to wave the privilege which the law confered on him, to protect him against the impositions of designing persons, the subsequent promise will operate upon the preceding consideration (*x*); but such subsequent promise must be given voluntarily, and with full knowledge by the infant, that he then stood discharged by law: and if a promise be extorted by the terror of an arrest, or given from ignorance of the protection which the law affords in such cases, it is not binding (*y*). But in all cases of subsequent promise, if the original transaction is not perfectly fair, and the infant be entrapped into a ratification of it immediately upon his coming of age, equity will give relief (*z*).

(*u*) *Per* Lord Mansfield in Watson *v.* Turner, Bull. N. P. 147, recognised by Lord Ellenborough in Atkins *v.* Banwell, 2 East 506.

(*x*) *Per* Ashurst, J. in Cockshott *v.* Bennett, 2 T. R. 766, and see Southerton *v.* Willock, 2 Stra. 690.—Hylling *v.* Hastings, 1 Lord Raym. 389.—Brothwick *v.* Carruthers, 1 T. R. 648.

(*y*) Harmer *v.* Killing, 5 Esp. N. P. C. 102.

(*z*) Brooke *v.* Gally, 2 Atk. 34.

But

* Sed vide Stevens v. Lynch, 12 East 38.

When the deft after full age promises to pay, when he is able, the plt. must prove ability; but extensible circumstances are suffict. Cole v. Sibley, 3 Esp. 159.

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But though no subsequent promise will operate to revive a *void* security (*a*), yet a *security* given by an infant, which is only *voidable*, may be revived by a promise after he comes of age (*b*); but it seems that if a bond be given by an infant, during his minority, for the amount of a simple contract debt, not for necessaries, the giving of the speciality which is good till avoided by the infant, will *extinguish* the simple contract debt, and consequently there is no consideration for a promise after full age to act upon; and therefore, notwithstanding such subsequent promise, no action of assumpsit can be brought on the original consideration (*c*); and if an action is brought on the bond, the infant may avoid it by plea. Yet in such case if the obligee forbear to sue upon the bond after the obliger is of age, such forbearance will be a good consideration to support an assumpsit (*d*): but in Roll's Abg. 18, the contrary is laid down for law, and Morning *v.* Knop is cited; but it appears by the report of that case in Cro. Eliz. (*e*) that there were only two judges in court when the case was decided, and they differed in opinion on this point. No judgment was given.

6. It is clear that a person attainted is incapable of making any contract for the purchase or sale of goods; for independent of his being, by the attainder, put out of the protection of the law, and considered to all civil purposes as dead, all his personal property becomes by his conviction forfeited to the crown, so that he has nothing wherewith to give the *quid pro quo*, which we may remember is necessary in the contract of sale.

It will here be proper to enumerate those offences

(*a*) Cockshott *v.* Bennett, *ante*.
(*b*) *Per* Ashurst, J. ibid.
(*c*) Tapper *v.* Davenant, 3 Keb. 798.
(*d*) Stone *v.* Wythipoll, Cro. Eliz. 127, and see 3 Leon. 164, 4 Leon. 5.
(*e*) P. 700.

which

which induce a forfeiture of goods and chattels, as such forfeiture is a consequence of conviction of many crimes for which the offender is not attainted, (which happens only where judgment of death is given).—Goods and chattels then are totally forfeited by *conviction* of *high treason*, or *misprision* of treason; of *petit treason*; of *felony* in general, and particularly of *manslaughter*; or even by conviction of *excusable homicide* (*f*); by *outlawry* for treason or felony; by conviction of *petit larceny*; by *flight* in treason and felony, even though the party be acquitted of the fact; by *standing mute*, when arraigned of felony; by *drawing a weapon on a judge*, or *striking* any one *in the presence of the King's courts*; by *præmunire*; by *pretended prophecies*, upon a second conviction; by *owling*; by *residing abroad* of artificers; and by *challenging to fight* on account of money won at gaming (*g*). And this forfeiture accrues upon the *conviction* of the offender, or if the jury find that the offender fled, upon the finding of such flight by the jury (*h*); or in case of outlawry for treason or felony, upon the offender being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice, is construed a flight in law (*i*). But as this forfeiture of goods has no anterior relation, as in the case of forfeiture of lands, a traitor, felon, or other offender, may sell his goods and chattels at any time before such forfeiture actually accrues to the crown, by the conviction, &c. (*j*); though it is said, that if the offender be killed in flying from, or resisting the officers of justice, the forfeiture shall relate to the time of the *offence committed* (*k*); or according to

(*f*) Co. Lit. 391.—2 Inst. 316.—3 Inst. 320.
(*g*) 2 Blac. Com. 421.
(*h*) 3 Inst. 232.
(*i*) Ibid.
(*j*) 2 Haw. P. C. 454.
(*k*) Ibid.

Lord

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Lord Hale, (and which seems to be the better opinion) *to the time of the flight* (*l*). But notwithstanding an offender may sell his goods *bonâ fide*, before conviction, &c.; yet if he make over such goods by a colourable sale, for the purpose of defeating the right of the crown, such sale is void both by common law (*m*), and the statute 13 Eliz. c. 5; and such collusive sale in fact transfers no property to the vendee, and the offender, if acquitted might recover back his goods.

Thus, where one Jones (*n*) being in Newgate, made a bill of sale of goods to his son; upon trover brought by the son against the sheriffs of London, the bill was held fraudulent by Lord Holt: for though a sale *bonâ fide*, and for a valuable consideration, is good, because the party has a property in the goods till conviction, yet such a conveyance as this cannot be intended for any other purpose than to prevent forfeiture, and defraud the King, and this the learned Judge, laid down was a fraud at common law.

7. With respect to alien friends, there can be no doubt about their right to trade in this country, and by consequence, to sue and be sued upon contracts relating to personal property, the same as natural born subjects (*o*). But with respect to alien enemies, the case is different. It is an established principle of the law of nations, that all trading between subjects of states at war is illegal, a principle obviously arising out of the nature of warfare, which puts each individual of the respective

(*l*) 1 Hale Hist. P. C. 362.
(*m*) 2 Haw. P. C. 455.
(*n*) Skinner 357-8.
(*o*) See 27 Edw. 3. c. 2.—14 Edw. 3. stat. 2. c. 2.—9 Edw. 3. c. 1.—25 Edw. 3. c. 2.—2 Rich. 2. c. 1. and many other old statutes declaratory of this right, and for the protection of aliens; and *see* Co. Lit. 129 b.--Dyer 2 b.

belligerent

belligerent governments, as well as the governments themselves, in a state of hostility.—"*Nam cum alicui bellum* "*indicitur, simul indicitur ejus populi hominibus*" says Grotius (*p*): and another eminent jurist says, "*ex na-* "*turâ belli commercia inter hostes cessare non est dubi-* "*tandum* (*q*)." And there is no such thing as a war for arms, and peace for commerce. In the state of warfare, all treaties, civil contracts, and rights of property, are put an end to: and therefore, trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice, and the rights of property, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading affords that aid and comfort in the most effectual manner, by enabling the merchants of the enemy's country to support their government. CHAP. II.

This principle of the law of nations is most fully recognised by the law of England (*r*). The king may, however, by his prerogative, licence a British subject to trade with the enemy (*s*); which dispensing power is vested in the sovereign by most of the states of Europe (*t*). If such licence to trade be obtained, it will so far legalise such trading, as to enable a British subject to maintain an action in our courts upon any contract arising out of it; but it will not remove the disability of the alien enemy to sue, so that though the transaction is legal, by the effect of the licence, a British Court of

(*p*) De Jure Belli ac Pacis, 3. c. 4. § 8.—and see Vattel, l. 3. c. 5. § 70. and l. 3. c. 15. § 225.

(*q*) Bynkershoeck Quæs. J. P. lib. l. c. 3.

(*r*) 2 Rolle's Abg. 173.—The case of the Hoop. 1 Rob. Adm. Rep. 196. and Potts *v.* Bell 8 T. R. 561.

(*s*) Potts *v.* Bell, *supra*.-and Vandyck *v.* Whitmore.—1 East 486.

(*t*) Bynkershoeck, Q. J. P. l. 1. c. 3.

Justice

CHAP. II. Justice cannot enforce it at the suit of an alien enemy residing in the hostile country, *flagrante bello* (*u*); and it it would seem that no action can be maintained on his behalf; for the right to sue on a contract of sale, being a *chose in action*, the action must at all events be in the name of the assignor: and consequently, his personal disability, as an alien enemy, will prevent the recovery by the assignee, or trustees.

But if an alien enemy come into this kingdom with a safe conduct, or under the King's protection, his disability to sue is removed, and he is thereby put on the footing of an alien friend (*x*), and it is not necessary to shew an actual licence in such case, for in the report of the case of Wells *v.* Williams, in Lutwyche, it is said, "If "an alien enemy come here in time of war, and continue "without disturbance, it shall be intended that he came "with a licence".

There is, however, one peculiar situation in which an alien enemy may be placed, in which his capacity to contract may admit of a doubt, and that is, where he is taken and brought to this country as a prisoner of war; he still continues an alien enemy, and does not come within the exception of residing here under licence; being merely confined for safe custody, whence it would at first seem that he could form no contract which could be enforced by a court of justice; the solution to this difficulty must be looked for in the nature of the situation of a prisoner of war.

(*u*) Co. Lit. 129, b.—Dyer 2 b.—Kensington *v.* Inglis.—8 East. 273.—Timson *v.* Merac. 9 East 35.—Brandon *v.* Nesbitt. 6 T. R. 23.—Bristow *v.* Towers, 6 T. R. 35.

(*x*) Watford *v.* Masham.—Moor 431.—Wells *v.* Williams, 1 Salk 46.—1 Ld. Raym. 287.—1 Lutw. 34. S. C.

In former times, prisoners taken in war became the property of the captors, and were sold for slaves, upon the erroneous notion, that having spared the life of the captive in battle, the captor thereby acquired a right to his perpetual service: but this barbarous practice has long been exploded, and in the present age, prisoners of war are only detained till ransomed or exchanged (*y*); which is indeed all the legitimate right that conquest confers on the captor over the person of his prisoner: the object of his caption being, only to prevent him from taking up arms again; and thereby weakening the enemy: and as this object can be equally answered by suffering the prisoner to go at large on his parole, as by incarceration, officers, and men whose rank in life entitles them to such confidence in their honour, are usually released on their parole: an indulgence which would ameliorate their captivity but little, if they could not enter into any contract for supplying themselves with the necessaries and conveniences of life, which from the general principles laid down in the former part of this division of the section, it would seem they could not. Writers on the public law do not appear to have noticed this particular case, yet they admit of cases where the individuals of a state may enter into contracts with the enemies of that state (*z*); but these contracts M. Barbeyrac observes (*a*), ought not to be considered valid, unless they are authorized by the express, or tacit consent of the sovereign or state; *but in case they are so authorized, the sovereign may enforce them.* The contract for the ransom of a prisoner, or his property, is a contract of this sort, and

(*y*) Grotius de Jure Belli ac Pacis, lib. 3. c. 7.--Bynkershoeck Q. J. P. Pub. lib. 1. c. 1.

(*z*) Grotius de jure Belli ac Pacis l. 3. c. 23, De fide privata in bello — and Puffendorf de Leg. Nat. lib. 8. c. 7. § 16.

(*a*) Note on Puffendorf.

it

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it never has been doubted, that such contracts are binding by the public law (*b*) *; and except in the case of ships &c. will be enforced by the law of England (*c*); though in such cases where the party seeking to recover on the contract, is residing in the enemy's country, or *sui juris*, the policy of the law suspends the right of action till the termination of the war, that the hands of the enemy may not be strengthened by drawing money from this country (*d*); but this reason would not apply to the case of a prisoner of war, who cannot go abroad at pleasure. Upon the whole it would seem, that prisoners of war, and officers and others on their parole in a particular manner, may make binding contracts during their captivity; in the case of those on parole by the licence of the sovereign, their contracts seem to be within M. Barbeyrac's rule, as made by the *tacit consent* of the state, for it may may fairly be presumed that, when any indulgence is granted to a prisoner, those rights which are necessary to the enjoyment of that indulgence, are incidentally granted; and as it would be nugatory to allow a prisoner his parole, without allowing him to make a contract for his lodging and other necessaries, it surely is not too much to say, that he may bind himself by such contracts made whilst residing here, under what Mr. Justice

(*b*) Grotius l. 3. c. 7.—Vattel, L. N. l. 3. c. 8. 153.

(*c*) Ricord *v.* Bettenham.—3 Burr. 1734.—1 Blac. 563. S. C.

(*d*) Co. Lit. 129. b.

* The reader may also refer to the report made by Mr. Blackstone in Ricord *v.* Bettenham, of the opinions of several eminent foreign jurists, with whom he had consulted on this point, 1 Blac. 563. It should be observed, that in that case a hostage had been given for the payment of the ransom bill, who died in prison, and this was relied on as a discharge of the contract.

Heath,

Heath calls "a protection arising from situation (*e*)." That learned Judge, in delivering his opinion in the case referred to, observes,—"If a prisoner of war is in confinement, he is protected as to his person: if he is on his parole, he requires further protection than what relates merely to his person."—again he says, "I will add one case to shew that a prisoner at war may sue and be sued. The son of the celebrated Mississippi Law was brought over here as a prisoner at war, and being on his parole, was arrested for ten thousand pounds, by the executor of a creditor, who swore that he was indebted, as appeared by the testator's books; he was discharged however, not because he was a prisoner at war, but because the executor had not inserted in his affidavit, that he was a debtor 'as he believed.' If a prisoner at war can be sued, there is no reason why he cannot sue."—This opinion is certainly a very respectable authority, but the point has never yet been brought before the court; the case in which Mr. Justice Heath delivered the opinion above quoted, was decided upon its peculiar circumstances.—It was as follows:

Assumpsit for wages due to the plaintiff as a seaman (*f*).—Pleas. 1st, Non assumpsit.—2dly, That the plaintiff was an alien, born in foreign parts, (to wit) in Holland, in parts beyond the seas, out of the allegiance of the king of Great Britain, and within the allegiance of a foreign power, and that before the suing out of the original writ of the plaintiff, and before the said day and year in the said declaration mentioned, to wit, on, &c. a public and open war was commenced, waged, and carried on and from then, &c. between our Lord, the now King of his subjects, and the persons exercising the powers

(*e*) In Sparenburgh *v.* Bannatyne, 1 Bos. and Pull. 171. 2 Esp. 580. *supra.*

(*f*) Sparenburgh *v.* Bannatyne, *supra.*

of

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tain voyage, wherein the said ship or vessel was then bound, to wit, from the Island of St. Helena aforesaid, to the port of London aforesaid, to wit, at, &c. Without this, that he the plaintiff, at the time of suing forth the original writ of him the plaintiff was, or at any time hitherto hath been, an enemy of our said Lord the King adhering to the persons exercising the powers of government in Holland, and so being enemies of our said Lord the King, as in and by the said plea is above alleged. And this, &c. A similar replication to the third plea.—And issue on the traverses.

It appeared upon the trial, that the plaintiff was a native of Oldenburgh in Germany, and was taken prisoner at the cape of Good Hope, he then serving as a sailor in the Dutch fleet under Admiral Lucas; that he was sent from the Cape to St. Helena in a British frigate, as a prisoner of war, and was then put on board the Caledonia, a British merchantman, then in great want of hands, by order of the governor of the place; that during the voyage from St. Helena to England he was treated like the rest of the crew, and did his duty to the satisfaction of the captain, the defendant in the action; that on his arrival here, he was delivered over to the commissary with the other prisoners taken on board the Dutch fleet, and was, at the time of the action brought, in custody as a prisoner of war. Verdict for the plaintiff, twenty-four pounds.—Upon a motion for a new trial,

EYRE, C. J. stated the question to be, Whether on the evidence produced in this case, the plaintiff was to be considered as an alien enemy at the time when the writ issued? "If he must be so considered, (said his lord-"ship), I take it to be a necessary consequence, that "this action must fail. The fact is, that this man, being

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" native of some part of Germany, and therefore a neu-
" tral by birth, was found on board a ship belonging to
" the enemies of this country, and was captured in ac-
" tual hostility. What then is his situation? Having
" been taken in the act of hostility, he is either a pirate,
" or *quoad* that act of hostility, a subject of the prince
" or power under whose commission he acted. No
" doubt, this man being a neutral by birth, committed
" an act of hostility against this country, under a com-
" mission from a state at war with this country. So far
" I take it to be clear."—His lordship, after observing, that he agreed with the defendant's counsel, that it was not in all cases necessary to state in a plea of alien enemy, that the party was an alien enemy born, drew a distinction between the subjects of the belligerent state, and neutrals, who put on the temporary character of enemies, by accepting a commission from such state; in support of which distinction, he cited the case of Captain Vaughan (*g*), where it was held by Lord Holt, and agreed to by the rest of the court, that the Hollanders by accepting a commission from the French King became *subditi Gallici*, and so remained during the continuance of their service, in a state of qualified subjection arising out of the service, and determining with it. " Here the
" commission under which the plaintiff, being a German,
" acted, was put an end to by the capture of the frigate
" in which he was.—After that time he had no oppor-
" tunity of continuing in the service of the state of Hol-
" land; and his temporary character of alien enemy
" ceased and determined with the authority under which
" he acted. Captain Vaughan's case, as far as it goes,
" draws a line, and fairly marks out where that charac-

(*g*) 4 State Trials. 328.

" ter

" ter begins, and where it shall end. I am of opinion, " that it determines by the very nature of the subject, " and being so determined, the disability of the plain- " tiff ought not to be enlarged or continued until the " war was concluded, to let in one of the harshest, " one of the most impolitic, nay immoral defences " that ever was set up in a court of justice. The " man, whether he was under a safe-conduct or not, " did his duty faithfully, and was duly approved of by " the officer of the Caledonia; he asks for a moderate " reward for his services, and is paid with a plea of alien " enemy. This is certainly one of the hardest cases I " ever knew, and I think we ought to lean against it.— " And if a distinction be found between the permanent " character of alien enemy, to which the courts of jus- " tice cannot give protection, and the temporary cha- " racter, we shall readily adopt it.—As the real justice " of the case is with the verdict, and a legal distinction " to exclude this unworthy defence can fairly be main- " tained, I think no new trial should be granted."

HEATH, J. " I am quite of the same opinion with my " Lord, and I am glad that some legal ground can be " found, on which we may repel this dishonest defence. " *It has been said, that a prisoner at war cannot con-* " *tract: his case would be hard indeed if that were* " *true. Officers on their parole must subsist like other* " *men of their own rank; but according to such doc-* " *trine they must starve; for they could gain no credit* " *if deprived of the power of suing for their own debts.* " It has also been argued, that if the plaintiff was under " a protection, that circumstance ought to have been " pleaded; and that is true of a formal protection under " the great seal; but there may be a protection arising " from situation.—*I think the plaintiff being a prisoner*

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" at war at the time of making the contract, may " maintain an action on that contract, and is protected " by law."

Rooke, J. "The defence has no foundation in con- " science, in justice *or in public policy*, and I do not " feel disposed to assist it. An enemy under the King's " protection may sue and be sued: that cannot be doubt- " ed. *A prisoner at war is, to certain purposes, under* " *the King's protection, and there are many cases where* " *he can maintain an action.* I will suppose that an of- " ficer of high rank on his parole is possessed of a ring " or a jewel of great value, on which he wants to raise " money, and that a tradesman is so dishonest as to re- " ceive it from him, and refuse either to advance the " money or return the pledge. Surely the court would " say, that he might recover his ring or his jewel from " the tradesman. The present plaintiff has in fact done " much the same thing. Under the licence of the King's " officer, he pledged his labour at St. Helena in order " to procure a more comfortable subsistence. Accord- " ingly, he worked his way over, and earned a reason- " able compensation. That being the case, I see no " reason why he should not recover, *even if he were* " *alien enemy born.* But as my Lord has not thought " proper to go so far, I speak to that point with diffidence, " and shall rather avail myself of the distinction which " has been drawn between the temporary and perma- " nent character of alien enemy; laying in a claim, how- " ever, to say, at any future day, that a person in the " situation of the plaintiff is like the officer who pledged " his jewel; for this contract was made under the licence " of those who had authority to licence the contracting " party."—Rule discharged.

It will be observed, that this case was decided upon the

the distinction taken between the temporary and permanent character of alien enemy: a subsequent case, however arose under similar circumstances, where the plaintiff was a natural born subject of a state at war with Great Britain.

Assumpsit for work and labour—*quantum meruit*, and the common money counts (*h*). The defendant pleaded that the said Joseph (the plaintiff) was an alien enemy, born in foreign parts, to wit, in Spain, out of the allegiance of our Lord the King, and within the allegiance of a foreign King, to wit, of the King of Spain, to wit, at London, &c. and that the said Joseph came into this kingdom without letters of safe-conduct: and that the said Joseph, before and at the time of the commencement of the suit, was a prisoner of war in this kingdom, to wit, at, &c. and that before and at the time of the commencement of the said suit, the King of Spain and his subjects were at open war with, and the enemies of our said Lord the King and his subjects, to wit, at, &c. The plaintiff replied, as to the said plea, as far as the same relates to the first and second counts of the declaration, (protesting that the plea was insufficient), That he the said Joseph, before the time of the doing, performing, &c. the work and labour, &c. to wit, on, &c. in parts beyond the seas, to wit, at, &c. was made prisoner of war by certain forces of his present Majesty King George the 3d, and before and at the time of doing, performing, &c. was by and with the consent of the commanding officer of the said forces, put under the care and custody of the said George (the defendant), to be by him carried and conveyed, as such prisoner of war into this kingdom, to wit, at, &c. and thereupon, whilst

(*h*) Maria *v.* Hall.—1 Taunt. 33. n.

the

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the said Joseph was so under the care and custody of the said George, and before the doing, performing, &c. to wit, on, &c. at, &c. the said George retained the said Joseph for certain hire and reward to be therefore paid to the said Joseph, to do, perform, and bestow the said work and labour, &c. in the said declaration mentioned. And the said Joseph thereupon, whilst he was so under the care and custody of the said George, to wit, on, &c. and on divers other days between that day, &c. did perform and bestow the said work and labour, &c. on the retainer of the said George, at his special instance and request to wit, at, &c. And as to the said plea, so far as the same relates to the other counts of the declaration, That the said Joseph, before the commencement of this suit, to wit, on, &c. at, &c. came into this kingdom under the protection of his present Majesty King George the 3d, and remained and continued in this kingdom under the protection of his said Majesty from thence continually, until the commencement of this suit, to wit, at, &c. The defendant demurred generally to so much of the replication as related to the two first counts, and tendered issue on the residue.—The plaintiff joined in demurrer and issue.

The case was twice argued, and upon the second argument it was said by Mr. Justice Rooke, that the principle laid down in Sparenburgh *v.* Bannatyne seemed to go the whole length of supporting the present plaintiff's right of action: but the court took time to consider their judgment—no judgment, however, was ever given.

These cases warrant the conclusion that, under the circumstances stated in them, an alien enemy may form a valid contract, even during the war; but it may be objected, that though an alien enemy under certain circumstances may sue for a remuneration for his *personal labour*

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labour, or upon that class of contracts, which the civilians arrange under the head of *do ut facias*; yet when the contract is *do ut des*, the case is widely different, inasmuch as it is impossible for a prisoner of war to enter into a contract, the object of which is the exchange of money for goods, or goods for money, because all the property possessed by a prisoner of war when taken, becomes the property of the captor or his sovereign, as being part of the *res hostiles*.—To this it may be answered, that though the principle upon which this objection rests, may be true in the abstract, yet the right of spoilation is an odious right, and ought not to be extended to any thing not absolutely seized, and reduced into possession; and for this we have the authority of Grotius (*i*); "*Ex eo, quod diximus, captivos nostros ser-*" *vos non esse, sequitur cessare illam acquisitionem uni-*" *versalem, quam accessionem esse dominii in personam* " *diximus alibi. Non alia ergo captori acquirentur quam* " *quæ specialiter apprehenderit: quare si quid clam secum* " *habet captivus, non erit acquisitum, quia nec posses-* " *sum. Sicut Paulus jurisconsultus contra Brutum* " *& Manilium respondit, qui fundum possessione cepit,* " *thesaurum, quem in fundo esse nesciat, non cepisse:* " *quia qui nescit nequeat possidere. Cui consequens* " *est, ut res eo modo celata ad redemtionis pretium sol-* " *vendum prodesse possit, quasi retento dominio.*" To this we may add the authority of Puffendorf (*k*); who cites with approbation the following story out of the life of Castriot (*l*). "A young man of the barbarous nations, " that happened to be made a prisoner, was presented " to Musachius for his share of the booty, who agreed

(*i*) De Jure Belli ac Pacis, lib. 3. c. 21. § 28.

(*k*) Lib. 8. c. 7. § 14.

(*l*) *Vide* Marinus Barletius de vitâ Castriotæ, l. 7.

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" to give him his liberty for two hundred pieces of gold. " The young man immediately took the money out of " his pocket, and offered to give it for his ransom: but " Musachius refused to accept it, or give him liberty, " telling him that the money was his own before, when " he became master of his person. But when the case " was brought before Castriot, he determined in favour " of the young man."

It may be proper here to notice the case of Anthon *v.* Fisher, in which it was determined upon a writ of error in the Exchequer Chamber (*m*); that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war: upon a reference to the subject matter of that action (on a ransom bill) it will be seen immediately that that decision does not at all affect the contracts under consideration; the cause of action arose there not only during the war, *but out of an act of hostility.*

The observations on this subject will be concluded with the opinion of Lord Chief Justice Eyre, upon the argument of policy which is generally urged against giving effect to the contracts of alien enemies.—" As to " the ground of policy" (says that learned Judge (*n*),) " namely, that a benefit would result to the enemy from " the plaintiff recovering; it is a policy, perhaps doubt- " ful, certainly remote, and which I do not hold to " be satisfactory. I take the true ground upon which " the plea of alien enemy has been allowed is, that a " man professing himself hostile to this country, and in " a state of war with it, cannot be heard if he sue for " the benefit and protection of our laws, in the courts

(*m*) Doug. 650. n.

(*n*) In Sparenburgh *v.* Bannatyne.—1 Bos. and Pull. 170.

" of

" of this country. We do not allow even our own sub-
" jects to demand the benefit of the law in our courts,
" if they refuse to submit to the law and jurisdiction of
" our courts. Such is the case of an outlaw. Modern
" civilization has introduced great qualifications to soften
" the rigors of war; and allows a degree of intercourse
" with enemies, *and particularly with prisoners of war*,
" which can hardly be carried on without the assistance
" of our courts of justice. It is not therefore good po-
" licy to encourage these strict notions, which are in-
" sisted on, contrary to morality and public convenience."

SECT. II.

Of Contracts made by one of several Partners.

AS we shall have occasion in this section to see, to what an extensive liability persons trading in partnership may be subjected, by the act of any one of the partners; it will be necessary, in the first place, to ascertain what shall be considered as constituting a partnership.

It seems essential to the very nature of a partnership, that there should be a communion of profit and loss. The shares of the several partners must be joint, though it is not necessary they should be equal*. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. And therefore where A, B, and C, ordered D a broker to buy a quantity of oil. B and C, were to have for their respective shares, each one fourth. The broker buys divers ship-loads; the purchase was made in the name of A. It was held by Lord Loughborough, C. J. Heath, J. and Gould, J. against the opinion of

* See the Inst. lib. 3, tit. 26. *De Societate.*

Wilson,

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Wilson, J. that B and C were not partners with A, there being no communion of profit and loss(*o*). So where the plaintiffs, who were bankers(*p*), had advanced a sum of money on certain tea-warrants of the East India Company, to Contencin a broker, who deposited the warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. It appeared he had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the East India Company's sale, of which they (together with himself) were to have separate shares, the lots being in general too large for any one dealer. The practice at such sales is, for the company to give a warrant to the broker or purchaser, for the delivery of the quantity of tea purchased, on payment being made. At the time of sale twenty-five per cent is advanced, and is forfeited, unless the whole is paid on the third, which is the last day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged and money raised upon them; generally considerably less than the supposed value of the tea. It happened however in this instance, that, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the India House, the value of tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead, or had become bankrupts. The shares of the defendants were to be two sixteenths of the whole lot.

(*o*) Coope and others, *v.* Eyre and others, 1. H. Bl. 37.—and see Dry *v.* Boswell, 1 Campb. N. P. C. 329.

(*p*) Hoare and others, *v.* Dawes and others, Dougl. 371.

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The action was brought for money lent, and the ground upon which the defendants were sought to be charged was, that all the employers of the broker, were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two sixteenths; nor was there any joint concern in the disposal of the tea. Under these circumstances the court held, that these was no partnership between the several purchasers; but merely an undertaking by each with the broker for a particular quantity; and Lord Mansfield said: It would be dangerous, if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts.—And Buller, J. added, The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner, nor were they partners among themselves; they had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make five hundred persons partners, who had never seen or heard of one another, or might at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants.

But to constitute a partnership their must be a participation in *uncertain* profits and losses; for if a party derives a *certain* profit out of a trade, (though if amounting to more than *five pounds per cent.* upon his capital embarked in it, it may be usury) he is not liable as a partner. And the true criterion to determine (where money is advanced to a trader) whether the lender is to be looked upon a partner or not, is to consider whether the premium or profit is *certain and defined*, or *casual, indefinite, and depending upon the accidents of trade.* In the former

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former case it is a *loan*, in the latter a *partnership*. And therefore where a retiring partner left four thousand pounds in the hands of the continuing trader for seven years at five pounds per cent interest, and an annuity of three hundred pounds for the seven years, for the payment of which he took a bond. It was held, that this transaction was neither a continuation of the old partnership, nor a commencement of a new one (*q*); but it is otherwise when the annuity is avowedly to be paid in lieu of the profits of the trade, and liberty is reserved for the annuitant to inspect the books (*r*).

If persons appear to the world to be carrying on business in copartnership, the presumption of law is that they are partners *inter se;* but even if that be not so, they are liable, as partners, to third persons.—As where A (*s*) having neither money nor credit offers to B, that if he will order with him, certain goods to be shipped upon an adventure, *if any profit should arise from them, B should have half for his trouble.* B having lent his credit on this contract, and ordered the goods *on their joint account*, which were furnished accordingly, and afterwards paid for by B alone: it was held that, though he was entitled to recover back such payment against A, who had not accounted to him for the profits, such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; yet B was liable as a partner to third persons. So where A and B, ship-agents at different ports (*t*), entered into an agreement to share in certain proportions

(*q*) Grace *v.* Smith, 2 Blac. 998.

(*r*) Bloxham and others, *v.* Pell, cited in 2 Blac. 999.

(*s*) Hesketh *v.* Blanchard and another, 4 East 144.

(*t*) Waugh *v.* Carver and others, 2 H. B. 235.

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the profits of their respective commissions, and the discount on the bills of tradesmen employed by them, in repairing ships consigned to them, &c. By this agreement they were held to become liable as partners to all persons, with whom either contracted as such agent. And again where A, B and C(*u*), the proprietors of a stage-coach, agreed to divide the general profits of the concern, and that they should each work the coach a stage with horses, their separate property, and maintained respectively at their separate expence. It was holden that B and C were jointly liable as copartners with A, for the price of hay furnished at A's request, for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach the stage allotted to him, under the agreement.

But in such cases a party *who has notice* of the agreement between the partners, shall not avail himself of the circumstance of the ostensible partnership; as where there was a stipulation between A, B and C, who appeared to the world as copartners(*x*), that C should not participate in the profit and loss, and should not be liable as a partner, C was held not liable to those who had notice of this stipulation; and that notice to one member of a firm was notice to a whole partnership.

But it is not every joint speculation in one or more adventures that will constitute a general partnership(*y*); though if it appear that two persons have in many instances traded jointly, that will be *primâ facie* evidence of a general partnership; particularly if the instances of *joint dealing* greatly outweigh the instances of *separate*

(*u*) Barton *v.* Hanson and others, 2 Campb. N. P. C. 97.

(*x*) Alderson *v.* Pope, 1 Campb. N. P. C. 404. n.

(*y*) De Berkom *v.* Smith and another, 1 Esp. N. P. C. 29.

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dealing. Thus, where A and B(z) had dealt as partners in two transactions only. It was urged that this would raise such a strong presumption of a general partnership, as to dispense with proof that the particular debt sought to be recovered, was contracted on the joint account; but Lord Ellenborough observed, that had the instances of joint dealing preponderated, he thought the *onus* would have been upon the defendants, to have shown that there was not a general partnership.

Acts subsequent to the time of delivering goods may be admitted as evidence to show, that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear that no partnership existed, at the time of the contract, no subsequent act, by any person who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them, as partners, for the very goods,) will make him liable in an action for goods sold and delivered (*a*).

But on the other hand, as a man is thus protected against debts due by the partnership, before he entered into it, so he will continue liable for the debts of the firm after he may in fact have withdrawn, unless the creditors of the concern have notice of the dissolution: and it seems that notice in the London Gazette will be sufficient notice to those who have had no previous dealings with the parties (*b*); but it is incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons

General notoriety is not sufficient to discharge the seceding partner, where no notice has been inserted in the Gazette. Graham v. Thompson, Peake, 42.

(z) Newnham and others, assignees, &c, *v.* Tetherington and Atty, *coram* Lord Ellenborough at Guildhall, Sittings after H. T. 7th of March 1810.

(*a*) Saville *v.* Robertson, 4 T. R. 720.

(*b*) Godfrey *v.* Turnbull, 1 Esp. N. P. C. 371.—and the same case by the name of Godfrey *v.* Macauley, Peake's Cases, N. P. 155, n. but from this report it appears to have been held that notice in the Gazette is in no case sufficient unless circumstances appear from which the jury may infer that the party saw the Gazette.

C. J. Dig. 17, 2, 74. Pothier, Traité du Contrat de Société, c. 1. s. 3. num. 3. Dig. 17, 2, 52.

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with whom they have had dealings (c). And therefore where a partner retires from a firm without giving notice; and the name of the firm continues without any alteration, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm (d). but it is [illegible] rtner whose [illegible]le only for [illegible]share of the [illegible]nent, unless [illegible]is liable the [illegible]e).

Ryder, p. 111.

Non-joinder of a dormant partner is no ground of nonsuit. Lesseck & Pollard v. Shattock, 1 Esp. 2. J. B. Lloyd v. Archbowle, 2 Taunt. 324. Bowman v. Gillett, ib. 325, n. And qu. whether the making the dormant partner a co-plt. would not have been a mis-joinder? vide per Mansfield C.J. 2 Taunt. 327. If the dormant partner be joined, it may be off a debt, owing to him from the ostensible partner only. Stacey Ross v. Decy, 2 Esp. 548 n. 1 C. & T.R. 361 n.

[illegible]name or on [illegible]the case of [illegible]strictly so [illegible]greements), [illegible]annot bind [illegible]hen, in an [illegible]hree parts, [illegible]e between [illegible]them as [illegible]W. and J. [illegible]of the third [illegible]ed by the [illegible]or Jackson, [illegible]ither Jack- [illegible]tion. The

court held, that a general partnership agreement, though

(c) Graham and others, v. Hope and others, Peake's Cases, N. P. 154. And see 1 Sid. 127.

(d) Parkin v. Carruthers, 3 Esp. N. P. C. 248. See App. p. 316.

(e) Evans v. Drummond, 4 Esp. N. P. C. 89.

(f) Parkin v. Harcourt, 5 Esp. N. P. C. 249.

(g) Harrison v. Jackson, 7 T. R. 207.

† No alteration in the printed checks of a mere notice of a change in the firm of a banking House to customers who have used the new checks. Barfoot v. Goodall, 3 Camp. 147.

† Grellier v. Neale, Peake, 146. Ryder. (would be made after the partnership had in fact ceased)

‡ money borrowed on the partnership account (Rothwell v. Humphries, 1 Esp. 406. And see Dig. 17, 2, 52, 4 L. 8, 2, 61. 1 Pothier, Traité du Contrat de Société, c. 7. num. 92, 93.)

When A. & B. give their acceptance for goods furnished on their joint credit & after dissolution of partnership the holder having taken a separate bill from A. as to the share of the former bill B. is discharged. Ibid. v. White, 3 Esp. 159 and see Smith v. Lasbrey, Camp. 469.

A. and B. trade under the firm of A. and Co.; A. and C. likewise trade under the same firm; B. is liable upon a bill issued by A. in the name of the firm, though taken with reference to the concern carried on exclusively by A. and C. Baker v. Charlton, Peake, 80. And see Thicknesse v. Wilkes, 1 East, 48. Swan v. Steele, 7 East 210. 1 C. 3 Smith, 109. Ex parte Bonbonus, 8 Ves. 542. Exp. Gordon, 15 Ves. 286. Jacaud v. French, 12 East 327. Ridley v. Taylor, 13 East, 175. Emly v. Lye, 15 East, 10. Pothier, Traité du Contrat de Société, c. 5. num. 92 et seqq.

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dealing. Thus, where A and B(z) had dealt as partners in two transactions only. It was urged that this would raise such a strong presumption of a general partnership, as to dispense with proof that the particular debt sought to be recovered, was contracted on the joint account; but Lord Ellenborough observed, that had the instances of joint de
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with whom they have had dealings (*c*). ‡ And therefore where a partner retires from a firm without giving notice; and the name of the firm continues without any alteration, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm (*d*); but it is otherwise in the case of a partner whose name does not appear in the firm; he is liable only for goods furnished during the time he receives a share of the profits, † though no notice be given on his retirement, unless he be known to be a partner, in which case he is liable the same as if his name had appeared in the firm (*e*).

Every parol contract by one partner in the name or on the account of the firm, binds the rest, as in the case of agreements under hand, parol agreements, strictly so called (as contradistinguished from written agreements), bills of exchange, &c. (*f*); but one partner cannot bind his co-partners by deed. And therefore when, in an action of covenant (*g*) upon an agreement of three parts, stated in the declaration to have been made between Jackson, Sykes and Rushforth, describing them as merchants and partners of the first part, W. and J. Harrison of the second part, and the plaintiff of the third part; it appeared that the deed was executed by the defendant Sykes in the following form—"For Jackson, "Self, and Rushforth; W. Sykes." But neither Jackson nor Rushforth was present at the execution. The court held, that a general partnership agreement, though

(*c*) Graham and others, *v.* Hope and others, Peake's Cases, N. P. 154. *And see 1 Sid. 127.*

(*d*) Parkin *v.* Carruthers, 3 Esp. N. P. C. 248. *See App. p. 316.*

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(*f*) Parkin *v.* Harcourt, 5 Esp. N. P. C. 249.

(*g*) Harrison *v.* Jackson, 7 T. R. 207.

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under seal, did not authorize the parties to execute deeds for each other, unless a particular power be given for that purpose. And that the contrary would be a most alarming doctrine to hold out to the mercantile world; for if one partner could bind the others by deed, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a lien on the real estates of the other partners.—But in mercantile transactions, in drawing and accepting bills, it never was doubted but that one partner might bind the rest, even without their knowledge or consent: thus; where one of two partners (*h*), though with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered as a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties: but where one partner colludes with a third person; or the person dealing with such partner knows, that he is not acting on behalf of the firm, the other partners will stand discharged of any contract under such circumstances, as against the person so colluding.

Assumpsit by the plaintiff (*i*) as indorsee of a bill of exchange, drawn by R. Cowan on one Rae, at two months after date, in favor of R. Packer, for sixty pounds, dated the 4th of March, 1796. The case, as proved on the part of the plaintiff, was, that on the 1st of March, the day on which the bill bore date, Gilson, one of the defendants, brought the bill in question to the plaintiff,

(*h*) Bond *v.* Gibson and another, 1 Campb. N. P. C. 185. And see Willett v. Chambers, 1 Cowp. 814.

(*i*) Arden *v.* Sharpe and another, 2 Esp. N. P. C. 523. And see Shirreff v. Wilkes, 1 East, 48. Ridley v. Taylor, 13 East, 175, 9. (App. 313.)

and

and requested him to discount it; the plaintiff said he could not do it himself; upon which the defendant, Gilson, answered, he could get it done for him, but wished the business to be kept a secret from his partner, Mr. Sharpe; to which the plaintiff assented, and took his bill. It was found, that the indorsement "Sharpe "and Gilson" was the hand-writing of Gilson. Lord Kenyon: This action under the present proof, cannot be supported; the bill is indorsed by one partner in the name of the firm; one partner certainly may indorse a bill in the partnership name; and if it goes into the world, and gets into the hands of a *bonâ fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable; but the case is different, where the party who brings the action was himself the person who took the bill with the indorsement of one partner only, and was informed that the transaction was to be concealed from the other; *he* cannot sue the partnership; the transaction indicates that the money was for that partner's own use, and not raised on the partnership account, therefore he shall not be allowed to resort to the security of the partnership, to which in the orignal transaction he neither looked nor trusted.

The authority of one partner to pledge the credit of the firm is not essential to a partnership: but such an authority is *implied* in every partnership, unless that implication is rebutted; as in the following case.—The plaintiff declared upon a promissory note made by the defendants, and one Whitehouse deceased (*k*), on the

(*k*) Lord Galway *v.* Matthew and another, 10 East 264.—1 Camp. N. P. C. 403. S. C.

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16th day of December, 1805, payable sixty days after date, to the plaintiff, or order, for two hundred pounds, value received. It appeared that the defendants and Whitehouse were partners in a brewery; and on the 16th day of December, 1805, Matthew wrote to the plaintiff, alleging the misconduct of his partner Smithson, in consequence of which the creditors of the partnership had insisted on the payment of their demands; that there was a certain sum to pay to the excise in a few days, and no resource but to apply to friends, and therefore requested of the plaintiff to lend him his acceptance for two hundred pounds at two months, for which he would send him the promissory note of the firm payable four days before the acceptance became due. In consequence of this the plaintiff agreed to lend his acceptance, and Matthew drew the note in question, which was signed by him for himself and his partners. Matthew immediately procured the plaintiff's acceptance to be discounted, and applied one hundred and eighty pounds of the money to the payment of the partnership debts, reserving the rest for himself. But the note in question not being paid when demanded of the defendants, the plaintiff, after renewing his acceptance to the holder, was ultimately obliged to pay it after Whitehouse's death. Matthew let judgment go by default, and Smithson defended the action, on the ground that the plaintiff before he took the note in question, had notice of an advertisement then recently published in a newspaper by Smithson, wherein he warned all persons not to give credit to the defendant Matthew, on his (Smithson's) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. Upon this being proved the plaintiff was non-suited, and the court afterwards refused a rule to set aside this non-

on the settlement of a private account between himself and C. suit
it takes a receipt from C. for the partnership demand: this is
good discharge. But if after an advertisement in the Gazette, an-
-uncing a dissolution of the partnership between B. and C. and
partner debts to be paid to the former only, such a receipt be

suit; and Lord Ellenborough said—"The general authority of one partner to draw bills or promissory notes to charge another is only an *implied* authority: and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, *which reached the plaintiff*, warning him that Matthew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others."

Upon the dissolution of the partnership between A. & B. the latter is entrusted with the [illegible] of affairs. He cannot indorse in the name of the firm a security which formed [illegible] of the joint effects; nor wo^d A. be liable tho' the money obtained upon negociating the [illegible] had been applied in liquidation of the partnership debts. Abel v. Sutton, 3 Esp. 108. And semble that A. wo^d not have been liable upon such an indorsement, tho' [illegible] whilst the partnership subsisted, if the [illegible] S. P. Kilgour v. Finlayson, 1 H. B. 155. ity had not been negociated after the dissolution. Ibid.

SECT. III.

Of Contracts made by Agents.

UNDER the general head of agents, may be included all factors, brokers, supercargos, &c.—A factor is a merchant's agent, either residing abroad, or in a different part of the kingdom from the merchant, to whom goods are consigned to be sold on commission, on account of his principal, and was formerly constituted by letter of attorney; but at present this formal appointment is frequently omitted, indeed such appointment is not at all necessary to enable the factor to dispose of the goods, for the mere possession will as between him and third persons raise an implication of a right to sell. When factors reside in England, and are employed by persons at a distant part of the country they are called

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home factors, as distinguished from *foreign* factors, such are the Blackwell-Hall factors, corn-factors, &c.

Brokers also are persons who buy and sell for others upon commission, and are generally confined to particular trades; thus we have—sugar-brokers, bill-brokers, stock-brokers, &c.—supercargoes are in the nature of factors, and are put on board of ships by a merchant to dispose of the cargo to the best advantage abroad.

It is very common to intrust factors and other agents to dispose of goods as their own, and to the best advantage, in which case the principal is bound, though the factor make an improvident bargain; but it seems that a bare commission to sell will not authorize the factor to sell on credit, other than the *usual credit* of the trade. And a factor ought to sell for the best advantage of his principal, and render a faithful account; and either remit the money to his employer, or return the commodity, if unsold, on demand (*l*): but no action lies against him for not accounting, till after a demand made of an account (*m*).

As to sales by factors on credit, Willes Ch. J. in Scott *v.* Surman (*n*) says—It has been objected that a factor, by virtue of a general authority, cannot sell on credit; and that if he do so it is at his own risk, and the owner is not obliged to accept the vendee as his debtor. And for this purpose several passages were cited out of the civil law books of the nature of a factor. To this I shall give two answers; 1st. that the nature of dealing is now quite altered, of which courts of law must take notice; for constant and daily practice shews that factors do

(*l*) Sadock *v.* Burton, 1 Bulst. 103.—Yelv. 202. S. C.

(*m*) Topham *v.* Braddick, 1 Taunt. 572.

(*n*) Willes, 406.

sell

sell upon credit, without such special authority. If it were otherwise, it would be the greatest prejudice to trade, as it would be likewise if this notion should prevail, that the owner must suffer by the factor's becoming a bankrupt: and we ought always as much as we can, and as far as is consistent with the rules of law, to do every thing to promote the trade and commerce of the nation.—And Chambre, J. in Houghton *v.* Matthews says, There is no doubt of the authority of a factor to sell upon credit, though not particularly authorized by the terms of his commission so to do (*o*). But as this authority is referred to universal usage, no such authority will be implied, unless it appear that it was the usual manner of dealing with reference to the thing sold; and therefore when, in an action for not transferring stock (*p*), it appeared that the defendant had employed a broker to sell out stock, which the broker accordingly agreed to sell to the plaintiff; but as the tranfer could not be made till the expiration of a fortnight, the plaintiff paid for the stock by a promissory note at fourteen days, which the broker thought it to the advantage of his employer to take, thinking the stock might fall before the transfer could be made. The note was paid by the broker into his own bankers, where it was attached for a debt of his own; and at the end of a fortnight the defendant refused to make the transfer, as he had received no part of the purchase money, Lord Ellenborough, C. J. said, When the defendant employed the broker to sell the stock, he employed him to sell it *in the usual manner*. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being

(*o*) 3 Bos. and Pull. 489.

(*p*) Wiltshire *v.* Sims, 1 Campb. N. P. C. 258. Anon. 12 Mod. 514 per Holt, C. J. acc. Anon. Dyer, 39, a. semb. cont. and see Winch, 532 Rol. 497. Willes, 407. 3 B & P. 489.

absolutely

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absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of stock which he agrees to sell? The broker here sold the stock in *an unusual manner;* and unless he was expressly authorized so to do, his principal is not bound by his acts.

The employment of a factor, broker, &c. being merely to sell, he has no power to pledge the goods (*q*); and therefore if a factor pledge the goods of his principal, the latter may recover the value of them in trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee (*r*), and that even though the factor or broker may have a lien on the goods, for his balance due at the time of the pledge; but it may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession as his servant for the preservation of his lien (*s*). So, as a factor cannot pledge the goods of his principal by delivery of the goods themselves, neither can he do so by indorsement and delivery of the bill of lading: and this rule holds equally good where the pawnee did not know that the pawner was a factor; for he might have inquired for the letter of advice which contained the bill of lading, which would shew that the goods were held as a factor, and not as vendee; but if persons will neglect all precaution, and advance money on goods without inquiring whether the party had any right to dispose of them or not, they must bear the loss, if it turn out that he had on authority so to do (*t*).

(*q*) Paterson *v.* Tash, 2 Stra. 1178.

(*r*) Daubigny *v.* Duval, 5 T. R. 604.—Mac Combie *v.* Davies, 6 East 538.

(*s*) Mac Combie *v.* Davies, 7 East 5.

(*t*) Newsom *v.* Thornton, 6 East 17.

not

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It is generally true that a factor's sale does by law create a contract between the owner and the buyer (*u*), and that though the factor receive a *del credere* * commission (*x*). And therefore if a factor sell goods in his own name without any reference to the principal, or without even making the principal creditor for them, in which case payment to the factor would discharge the vendee, yet if before actual payment, he receive notice from the principal not to pay the factor, notwithstanding which he does pay him, the principal may maintain an action against him for the price of the goods; unless the factor had a

(*u*) Scrimshire *v.* Alderton, 2 Stra. 1183.

(*x*) Escot *v.* Milward, Co. B. L. 414, and 7 T. R. 361. n. Ex parte Murray, Co. B. L. 415.

* *Del credere* is an Italian mercantile phrase, which has the same signification as the Scotch word *warrandiee*, or the English word *guarantee*. A factor who has general orders to dispose of goods for his principal to the best advantage, is bound to exercise that degree of diligence which a prudent man exercises in his own affairs, and consequently the factor is authorized to dispose of the goods on the best terms which can be obtained at the time; and if it shall appear that he has done so, and that he has sold the goods to persons in reputed good circumstances, at the time, and to whom at that time he would have given credit in his own affairs, he will not be liable to his principal, although some of these should fail; and for his trouble the factor is generally paid by a commission of so much per cent upon the goods sold. According to this practice, the principal runs all the risk, and the factor is sure of his commission whether the event be favourable or not. But many merchants do not choose to run this risk, and to trust so implicitly to the prudence and discretion of their factor; and therefore the agreement called *del credere* was invented, by which the factor, for an additional premium beyond the usual commission, when he sells the goods on credit, becomes bound to warrant the solvency of the purchasers.—See the Argument in Mac Kenzie *v.* Scott, 6 Bro. P. C. 287.

lien

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lien on them (*y*). But generally speaking when the owner of the goods allows the broker through whom he sells, to sell them as a principal, the purchaser of goods so sold is discharged by payment to the broker in any way which would have been sufficient had he been the real owner (*z*); and therefore if a broker sell goods as his own, the purchaser (not knowing of any principal) has a right to consider him as a principal, and consequently set off any debt due from him against the price of the goods (*a*); yet if in such case, before all the goods are delivered, and before any part of them is paid for, the purchaser is informed that they belong to a third person, he cannot set off a debt due from the factor in an action by the principal (*b*): so if goods are bought by a broker, who does not mention his principal until he himself has become insolvent, the ~~buyer~~ principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor (*c*). So too if goods are sold *to* a broker at a specified credit, the principal is liable to the vendor, if called upon when payment becomes due; although he may previously have paid the price of the goods to the broker, who became insolvent before the day of payment. But if in such case the day of payment be suffered to pass without any demand being made on the principal, it seems that he is discharged by payment to the broker; for as no demand is made upon him by the vendor he may fairly conclude, that he relies on the broker for payment (*d*).

(*y*) Drinkwater *v.* Goodwin, Cowp. 254.

(*z*) Coates *v.* Lewes, 1 Campb. N. P. C. 444. Blackburn v. Scholes, 2 Sc. 343.

(*a*) Rabone *v.* Williams, 7 T. R. 360. n.—George *v.* Clagett, 7 T. R. 359.—1 Esp. N. P. C. 557, S. C.

(*b*) Moore *v.* Clementson, 2 Campb. N. P. C. 22. S. P. Peake, 177.

(*c*) Waring *v.* Favenck, 1 Campb. N. P. C. 85. Paterson v. Gandasequi, 15 East, 62.

(*d*) Kymer *v.* Suwercropp, 1 Camp. N. P. C. 109, and 180. c. S. P. Speering v. Degraves, 2 Vern. 643.

If

If goods are sold by a broker for a principal not named, upon terms as expressed in the *Bought* and *Sold* notes delivered over to the respective parties by the broker, of, "*payment in one month, money,*" the buyer is discharged by a payment to the broker within the month: and that, though the payment be made by a bill of exchange, accepted by the buyer and discounted by him within the month: the stipulation in the contract, of "*a month money,*" meaning in the understanding of commercial men, payment *at any time within* a month (*e*).

If four or five merchants remit to one factor distinct parcels of goods, which he disposes of jointly to one person, who pays a moiety down, and contracts for the rest at a certain time, before which time the factor fails; the principals shall bear the loss proportionally amongst them (*f*). So where a person buys goods of a broker, without knowledge of the principal; and being also indebted to the broker for another parcel of goods purchased of a different owner through his intervention, makes a payment to the broker *generally*, which is larger than the amount of either demand separately, but less than the two together, and afterwards the broker stopped payment: such payment ought to be equally apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer (*g*).

Where a man appoints an agent generally, he is bound by all his acts; but where the agent's authority is limited, there the principal is only bound to the extent of his

(*e*) Favenc *v.* Bennett.—11 East. 36.

(*f*) Malyne's Lex. Mer. 81, 82.

(*g*) Favenc *v.* Bennett, *supra.*

authority:

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authority: and therefore where (*h*) one Briggs, a broker, bought a quantity of silk for the defendant at the plaintiffs' sale: the defence to an action for the price was, that the orders to Briggs were, to buy the best Bengal raw silk, whereas this was not raw silk, nor of the best quality.—Lord Kenyon took the distinction between a general and special agent; that in the first case the principal must be bound by all his acts, whereas in the latter he is only bound while the agent acts within the scope of his authority; and that if in the present case the defendant could prove that he had so specially authorized Briggs to bid for him for the best Bengal silk, and this turned out not to be of that description, that he should not be bound by this contract so made without his authority: but that Briggs should be liable to an action at the suit of the company for the abuse of it. This will also be seen in the following cases.

Action on the case for breach of contract (*i*).

The contract in question had been made at Stortford market, and was in the following words, "Sold *Mr.* "*George Hankin* three hundred and twenty quarters "of Hicks's malt, at seventy four shillings. (Signed) "J. Taylor."—Taylor was a malt factor at Bishop's Stortford, and had been employed by the plaintiff to sell the malt; he accordingly entered into the contract with *Joseph Hankin*, to whom he delivered a copy of the sale note.—Joseph Hankin was the son of the defendant. It appeared that he had done his father's business, and made his contracts at market for many years. The defence relied on was, that Joseph Hankin was the agent for his father under a limited authority, which he had exceeded:

(*h*) East India Company *v.* Hensley.—1 Esp. N. P. C. 111.

(*i*) Hicks *v.* Hankin, 4 Esp. N. P. C. 114.

exceeded; the instructions from old Hankin to his son were produced, by which it appeared that he was authorized to give sixty four shillings and six pence per quarter only. Joseph Hankin, however, on his cross-examination, admitted, that notwithstanding the written instructions he had received, he did consider himself at liberty to exceed the price fixed.—Heath, J. Though a special agent, acting under a limited authority, cannot bind his principal, if he exceed his authority, such special agent must be expressly limited as to price; if he is at liberty to exceed the limits, he is not a special agent. Mr. J. Hankin admits that he did not consider himself as bound by the direction in writing of his father; he considered himself at liberty to exceed that authority: and I am therefore of opinion that his principal is bound.—But where the holder of a bill of exchange (*k*) desired A to get it discounted, but positively refused to indorse it, and A delivered it to B for the same purpose, informing him to whom it belonged, and B, finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A's telling him that he would indemnify him: the indorsee took the bill upon the credit of the names upon it, without any knowledge of the real owner; although the original owner afterwards promised to pay the bill, yet such promise cannot support an action brought against him by the indorsee, it being *nudum pactum;* for as A was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority. Though if an agent be employed to get a bill discounted, without any restrictions as to the mode of doing it, and he warrant it to be a good bill, his employers are bound by

(*k*) Fenn *v.* Harrison, 3 T. R. 757.

his

CHAP. II. his act, and are liable to refund if the bill be afterwards dishonoured by the acceptor (*l*).

If a man entrust a servant or agent to sell for him, he is entrusted to do all that he can to effectuate the sale; and if he does exceed his authority in so doing, he binds his principal, thus:

In an action of assumpsit on the warranty of a horse sold by the defendant to the plaintiff (*m*). The warrantcy was, "That the horse was seven years old, and "free from vice."—The horse had been sent to Tattersall's; had been inserted in his catalogue as for sale, and described as seven years old. He had not, however, been brought to the hammer; but had been sold by private contract to the plaintiff by the defendant's groom before the auction. The evidence as to the warranty was, that the plaintiff having Tattersall's catalogue in his hand, went to the defendant's groom, who was then at Tattersall's, taking care of his master's horse. He had the horse brought out, and asked the groom if he was but seven years old? He said, "Yes." If he was free from vice? The groom said, "yes: he is, if you have him." The horse was then led back. Nothing was said about the price at that time, but the horse was soon afterwards delivered.—The evidence of the groom's declarations having been objected to. Lord Ellenborough ruled. That if a servant is sent with the horse of his master, and which horse is offered for sale, and gives the directions respecting his sale, he thereby became the accredited agent of his master, and what he says at the time of the sale, as part of the transaction of selling, respecting the horse, is evidence: but an acknowledgment to that effect, made at another time,

(*l*) Fenn *v.* Harrison 4 T. R. 177.

(*m*) Helyear *v.* Hawke.—5 Esp. N. P. C. 72. And see Bayley *v.* Lawrence, 3 T. R. 464.

is

is not so: it must be confined to the time of the actual sale, when he was acting for his master. Nothing having been said about the price at the conversation between the plaintiff and the defendant's servant so as to form a complete contract for the sale of the horse upon which the warranty could act: other evidence was given which did not, after all prove the warranty: but Lord Ellenborough, in answer to an objection taken at the bar, said, I think the master, having entrusted the servant to sell, he is entrusted to do all that he can to effectuate the sale; and if he does exceed his authority in so doing, he binds his master. It was afterwards proved that there was no warranty; but that the horse was to be taken with all faults.—And the plaintiff was nonsuited *.

A master of a ship, who is the agent of the owners, has not, as such, any power to sell the ship (*n*); and consequently, his sale transfers no property, and it seems that he has no implied authority to do so, even in a case of a seeming necessity, from the ship's being unseaworthy, and in the opinion of persons of competent skill in those matters unable to perform the voyage home; but even if any such authority is to be implied under such circum-

(*n*) Johnson *v.* Shippen.—2 Lord Raymond 984.

* As to warranties *in law*, by servants, this distinction is laid down in Rolle's Abg. 95, tit. Action sur case (S), That if a servant sell an unsound horse or other merchandize in a fair, to any man, no action lies against the master for the deceit, for he did not command the servant to sell to any one in particular. But if the servant by command and covin of the master sell it to any person in particular, and it be unsound, an action lies against the master, for it is his sale.—As to *express warranties* it has been said that, if a servant or apprentice, upon a sale of goods for his master warrant them, it will be a void warranty.—2 Roll. 270. but this seems very questionable, *vide* 1 Morg. Vad. Mec. 177. Vide Ante p. 316.

stances,

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stances, if the ship specifically subsists, and is capable of being used for the purposes of navigation, such sale is not valid, unless the forms prescribed by the ship-register-acts are complied with.—And no power to sell can be derived under a decree of the courts of Vice Admiralty abroad, upon the petition of the captain and survey, &c. (*o*). Neither has the captain any authority to assume to himself the character of agent to the owner of the cargo, and upon the voyage being lost, to dispose of the goods on account of the owner, and it was so ruled in the following case.

Action against the defendants (*p*) as owners of the ship Ranger, on a bill of lading signed by their captain, for two cases of cutlasses, to be carried from England to Surinam, "the act of God, the King's enemies, fire, "and all and every other dangers and accidents of the "seas, rivers, and navigation, of whatever nature or "kind soever excepted." The Ranger sailed in June, 1807, under convoy of the Julia sloop of war, with a large fleet for the West Indies, among which were four vessels for Surinam, besides herself. She strictly followed during the voyage, the directions of the Commodore, whose duty it was to inform different ships when they were to separate for their respective ports of destination. Through the error of the Commodore, the Surinam ships got to leeward of that settlement, and having ineffectually attempted to beat up to windward, were forced to put into Demarara in the end of August, and to remain there till the month of December, when a ship of war came to see them back to Surinam. They sailed with her; but after nine or ten days beating about, were carried farther to leeward. The Commodore then find-

(*o*) Reid *v.* Darby.—10 East. 143.

(*p*) Van Omeron *v.* Dowick.—2 Campb. N. P. C. 42.

ing

ing the attempt hopeless, ordered them to make for Tobago or Grenada. The Ranger put into the latter island, where the goods in question were sold by public auction, under the directions of the captain. The Attorney General, for the defendant contended, that the captain, under such difficult circumstances, was to be considered as the agent of the shipper, as well as the ship-owner, and that he had a discretionary authority to do what was best for all concerned. That it was clearly for the benefit of the plaintiff, that the cutlasses should be sold at Grenada, since they could not be carried to Surinam. He could therefore only claim the sum for which they were sold, and the action could not be maintained.—That the defendants had not been guilty of any breach of their undertaking, for the ship had done every thing that was possible to reach Surinam, and had been prevented from delivering the goods there by one of the risks excepted in the bill of lading.—Lord Ellenborough, I am decidedly of opinion, that you had no right to sell the goods. Expediency might require this step; but the captain could not put himself in the situation of the owner of the goods; and when he thus disposed of them, in point of law he was guilty of a tortious conversion. Whatever power he might have to sell a part of the cargo for repairs, he could not lawfully put a stop to the voyage; and it is difficult to say that there was a natural impossibility of proceeding to Surinam.

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Although the general principle of law is, that the principal is civilly responsible for the acts of his agent (*q*), yet as such responsibility arises from an authority from the principal express or implied to do those acts; it would seem he is not liable for a fraudulent misrepresentation made by the agent, for no authority to deceive can be implied from

(*q*) *Per* Lord Kenyon in Doe *v.* Martin. 4 T. R. 66.

held

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the nature of the agent's employment. And therefore it was held, that if a servant sell false stuff, an action on the case did not lie against the master, unless he sold it through his covin, or by his command (*r*); but in a subsequent case (*s*), where in an action on the case for a deceit, in selling silk of one kind for another, it appeared, that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea; the doubt was, if this deceit could charge the merchant? And Lord Holt, C. J. was of opinion, that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger: and upon this opinion the plaintiff had a verdict.—And this is agreeable to the rule of law that, where one of two innocent persons must suffer by the fraud of a third person, the one who enables such third person to commit the fraud must bear the loss.

We have seen that where a factor sells goods under a *del credere* commission, he is personally liable to his principal for the price: and so there are many other cases in which factors, brokers, &c. may be personally liable upon contracts made on account of principals; as where the principal resides abroad (*t*); where an auctioneer sells goods without naming his principal (*u*); or where an agent has notice that the property he is about to sell, does not belong to his principal, notwithstanding which he continues to sell (*x*): and so though the owner of a

(*r*) Bro. Ab. Action on the case pl. 8.

(*s*) Hern *v.* Nichols,—1 Salk. 289.

(*t*) De Gaillon *v.* L'Aigle.—1 Bos. and Pull. 357.

(*u*) Hanson *v.* Roberdeau, *v.* Peake's N. P. C. 120.

(*x*) Hardacre *v.* Stewart.—5 Esp. N. P. C. 103.

ship

ship is bound by the contract of the master for necessaries supplied for the use of the ship, yet the captain is also personally liable (*y*): but where goods were ordered for a ship by the owner before the appointment of the captain, though some were not delivered till afterwards, yet as no personal credit was given to the captain he was not held answerable for any of them (*z*).

Where a factor having a general authority gives a man time for the payment of money due for his principal's goods, and after the credit is expired, sells him goods of his own for ready money, and the vendee becomes insolvent; the factor is not personally liable to his principal, though he is bound in honesty to indemnify him (*a*). Neither is a public officer, contracting as agent of the government, personally liable, on contracts made by him in that capacity (*b*); even though he contract by deed (*c*).

Before we quit the subject of factors, it may be proper to notice a legislative regulation with respect to a particular class of them.—By stat. 31. G. II. c. 40. § 11. factors employed to buy or sell *cattle* by commission, are prohibited from buying, either directly or indirectly, on their own account (except for the necessary use of their families) live cattle, sheep, or swine, in London, or within the bills of mortality, or at any place whilst the cattle are on the road to London for sale; and from selling either by themselves or their agents such cattle, &c. in London, or within the bills of mortality, under the penalty of double the value of the cattle sold.

It may also be proper here to point out in what cases a master may be bound by the contracts of his servant.

(*y*) Molloy de jure Marit. 224. 228.—and Rich *v.* Coe, Cowp. 636.

(*z*) Farmer *v.* Davies, 1 T. R. 108.

(*a*) Molloy de jure Marit. 440.

(*b*) Macbeath *v.* Haldimand, 1 T. R. 172.

(*c*) Unwin *v.* Wolseley. ibid. 674.

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It may be laid down as a general rule, that a master is bound by all contracts entered into by his servant acting under his express, or implied authority (*d*). And such authority will be implied from the master having once affirmed the contract of the servant, by paying for goods bought by him upon trust (*e*); but if a master give his servant money to buy goods for his use, and the servant buy on credit, and embezzle the money, (if the master has never sent his servant to buy on credit) he is not liable to pay it again; thus, where the defendant (*f*) contracted with the plaintiff (who was a butcher) for all kinds of meat at a certain price for *ready money*. The cook maid was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea used to pay it; in general she paid once a week, on a Monday morning; and the defendant always gave the servant money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the defendant as above stated. At length the defendant got another cook-maid, and gave her money as usual, but she did not pay the bills as others had done, but suffered them to be in arrear thirty three pounds three shillings and three pence. She then ran away from the defendant's house, after which the defendant was called upon for the first time, to pay this sum of money.

Lord Kenyon said, nothing could be clearer than that when a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on

(*d*) F. N. B. 120. G.—Doc. and Stu. dial. 2. c. 42.—Noy's Max. c. 44.

(*e*) Hazard *v.* Treadwell 1 Stra. 506.

(*f*) Stubbing *v.* Heintz, Peake's cases, 47.—and *see* Pearce *v.* Rogers, 3 Esp. N. P. C. 214.

credit,

credit, he will be liable to whatever extent the servant shall pledge his credit. Here the contract between the parties was to deal for ready money: and the plaintiff when he let the bill run on to such an amount as the sum claimed, was giving credit to the servant, and not to the defendant. The defendant had not entered into any new contract, but still thought he was dealing on the same terms as before.—Verdict for defendant.

But when a man has been in the habit of dealing with a tradesman on credit, unless he give notice to the tradesman that in future he will pay ready money, he will remain liable for any goods delivered to his servant. And notice of alteration in the mode of dealing to the tradesmen's servant is not sufficient (*g*).

But if a servant employ a tradesman to do any work, *who has never been employed by the master*, and the tradesman does the work without any communication with the master, though the work was done to the master's property, he is not liable (*h*); for in such case the authority of the master cannot be implied. And in no case can any agreement between the master and servant alter the liability of the former as to third persons; and therefore where in an action for work and labour by the plaintiff, who was a smith and farrier, the defence was, that the defendant, by an agreement with his groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with medicines when necessary. Lord Kenyon said, this was no defence to the action, *unless the plaintiff knew of this agreement*, and expressly trusted the groom; for a tradesman has nothing to do with any private agreement between the master and servant (*i*).

(*g*) Gratland *v.* Freeman, 3 Esp. N. P. C. 174.

(*h*) Hiscox *v.* Greenwood, 4 Esp. N. P. C. 85.

(*i*) Precious *v.* Abel, 1 Esp. N. P. C. 350, *Dec.* Rich *v.* Coe, Cowp. 636

CHAPTER THE THIRD.

OF THE VENDOR'S PROPERTY IN THE THING SOLD.

CHAP. III.

IN considering the contract of sale with reference to to the vendor's interest in the thing sold, it will be necessary to contemplate it in this twofold point of view.

1st. Where the vendor hath in himself the property of the thing sold.

2dly, Where he hath not.

SECT. I.

Of Sales where the Vendor hath the Property of the Thing sold: which is either

1. *Absolute; or*
2. *Qualified,*
3. *In Possession; or*
4. *In Action.*

1. WHERE a man hath the *absolute* ownership in possession of any goods, it follows, that he hath also, as incident to such ownership, the right of disposing of them in any manner he may think proper. In cases however where a judgment has been obtained against a man for any debt or damages, the person who has obtained such judgment has a lien upon the property of the person against whom it is given for the satisfaction thereof. At common law this lien accrued from the teste of the writ of execution, so as to bind the property of the goods, and prevent the party against whom judgment had been given from making any intermediate disposition of it to defeat the execution

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tion of such judgment (*a*); so that if the goods were afterwards sold, though *bonâ fide* and for a valuable consideration, they were still liable to be taken in execution, into whose hands soever they came (*b*); (but it would seem that this was the rule only where the execution followed the judgment in the usual course, and that a person who had obtained judgment wilfully delaying his execution for any length of time, and after a sale to a *bonâ fide* purchaser, issuing his writ tested the term judgment was signed, should not have the benefit of this relation to the teste of the writ to defeat such sale (*c*);) which practice, though manifestly unjust, appears to have been very prevalent, for when the statute of frauds was under discussion in parliament, it was said, "that "the mischief was great that in long vacations when "goods have been sold in market overt, or taken upon a "distress, &c. a *fieri facias* tested the last term, should "come and over-reach them (*d*),"—to remedy which mischief it was enacted, by the statute of 29 Car. II. *c.* 3, § 16—"that no writ of *fieri facias*, or other writ of exe-"cution, shall bind the property of the goods of the "party, against whom such writ of execution is sued "forth, but from the time that such writ shall be deli-"vered to the sheriff, under-sheriff, or coroners, to be "executed; and for the better manifestation of the said "time, the sheriff, under-sheriff, and coroners, their "deputies and agents, shall upon the receipt of any such "writ, (without fee for doing the same,) indorse upon

(*a*) Year-book, 19 H. 8. pl. 10.—Moor 57.—Fleetwood's case, 8 Rep. 171.—Farrer *v.* Brooks, 1 Mod. 188.

(*b*) Farrer *v.* Brooks, *supra*.—Baskerville *v.* Brocket, Cro. Jac. 451.—Bragner *v.* Langmead, 7 T. R. 21-2.

(*c*) Bayly *v.* Bunning, 1 Lev. 174.

(*d*) *Per* Treby, Ch. J. in Houghton *v.* Rushby, Skin. 257.

"the

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"the back thereof, the day of the month or year whereon "he or they received the same."

But neither before this statute nor since is the property of the goods *altered* till the writ is executed; the meaning of the statute is, that if the party against whom a writ of execution is issued, after such writ is delivered to the sheriff, make sale of his goods, *unless in market overt*, the sheriff may still take them in execution as the goods of the vendor (*e*); and, therefore, where, in the beginning of this section, it is said, that where a man hath property in goods he may sell, unless judgment has been obtained against him, &c. it must be not understood that in the case excepted the sale *as between vendor and vendee* would not be good, but only that in such case the vendor cannot transfer an *indefeazable* right to the thing sold, but assigns it subject to the lien of a third person under the judgment, except the sale be made in *market overt*, as by a shopkeeper in London in the usual course of his trade *.

The statute being made in favour of purchasers (*f*), a purchaser seeking to protect himself under it must be a *bonâ fide* purchaser for a valuable consideration, and not claiming under a fraudulent sale; for in such case the goods are still liable to the execution in the hands of such fraudulent vendee; and the vendor continuing in possession as the visible owner of the goods after the sale, is a strong badge of fraud, and avoids such sale as against creditors (*g*).

(*e*) 2 Eq. Cases, Abr. 381.

(*f*) Anon. 2 Vent. 218.—Houghton *v.* Rushby, Skin. 257.

(*g*) Twyne's case, 3 Rep. 82.—Godb. 161.—Edwards *v.* Harben, 2 T. R. 587.—Paget *v.* Perchard, 1 Esp. N. P. C. 205, and Phillips *v.* Eamer, ibid 357-8.—Bull. N. P. 258.—Prec. in Chan. 286-7.

* By the civil law the vendee acquired no property in goods, sold in fraud of creditors, if he was privy to the fraud. Ff. lib. 18. tit. 1. 26.

if

So if a creditor seize the goods of his debtor under a *fieri facias*, and suffer them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution; it has been held that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable to the second execution (*h*); unusual privacy in the sale is another circumstance from which fraud may be inferred (*i*). CHAP. III.

Hence we may lay it down as a general rule that a man who has property in goods and chattels has an absolute and indefeazable right of disposition of such goods until a writ of execution against them is actually lodged in the sheriff's office, and even afterwards, until actually seized by the sheriff, provided they are *bonâ fide* sold, in market overt, to an innocent vendee without notice of the execution.

As however the King is not specially named in the statute of frauds he is not bound by it (*k*), consequently *extents* at his suit remain as at common law, and bind the goods of his debtor from the teste (*l*).

It may be well here to remark that goods and chattels remain liable only to executions against the immediate vendor, and not to those against the person of whom he purchased, though the first sale (made before the delivery of the writ to the sheriff) may have been fraudulent, and not entitled to the protection of the statute; provided the second sale is *bonâ fide*. Thus much for absolute property in possession—our next division of the vendor's property may again be sub-divided into—

2. Qualified property with respect to the subject mat-

(*h*) Ibid.—1 Vez. 245, 456.
(*i*) Twyne's case, 3 Rep. 81.
(*k*) Year-book, 2 H. 4. 14.
(*l*) Fleetwood's case, 8 Rep. 171.—The King against Mann, 2 Stra. 754.

ter;

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ter; and qualified property with respect to the peculiar circumstances of the owner.

First then a man may be invested with a qualified property in all creatures that are *feræ naturæ*, either *per industriam*, *propter impotentiam*, or *propter privilegium* (*m*)—*per industriam*, as in animals which are *feræ naturæ*, though tamed and confined by the industry of man, such as deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house *, pheasants or partridges in a mew, or fish in a private pond or in trunks—These are no longer the property of a man than while they continue in his actual possession; but if they at any time regain their natural liberty, his property instantly ceases (*n*): though according to the opinion of Grotius loss of property in wild animals reclaimed, does not immediately follow upon their escape; but on account of the great difficulty of recovering them, a man may well be supposed to have abandoned his right to them (*o*); which seems to accord well with the civil law (*p*) and our own (*q*); for while the owner is in the pursuit of them he still retains his property, as the act of pursuit rebuts the presumption that he has abandoned his right.

Animals however which have *animum revertendi* are considered in a different light. "*In iis autem animalibus quæ ex consuetudine abire & redire solent, talis*

(*m*) 2 Blac. Com. 391.
(*n*) Ibid 392.
(*o*) Lib. 2. c. 8. § 3.
(*p*) Ff. l. 41. t. 1. l. 5.
(*q*) Bracton l. 2. c. 1.—Finch L. b. 2. c. 17.

* Doves were reckoned amongst animals *feræ naturæ* by the civil law. Inst. l. 2. t. 1.—Ff. l. 41. t. 1. but see the observation of Puffendorf. L. 4. c. 6. Our law agrees with the civil law in considering them *feræ naturæ*. 10 H. 7. 630.

"*regula*

"*regula comprobata est: ut eousque tua esse intelli-*
"*gantur, donec animum revertendi habeant, nam si*
"*revertendi animum habere desierint, etiam tua esse*
"*desierunt, & fiunt occupantium—Revertendi autem*
"*animum videntur desinere habere tum cum revertendi*
"*consuetudinem deseruerint* (*r*)." To the same effect, and almost in the same words, speaks Bracton (*s*):—Amongst this class of animals Bracton reckons deer, swans, peacocks *, doves, &c: so a tame hawk that is pursuing his quarry in the owner's presence, though he has liberty to go where he pleases, is still the property of his original owner, for he has *animum revertendi*. But if animals having *animum revertendi* stray without the owner's knowledge, and do not return in the usual manner, they again become common, and it is lawful for any one to seize them to his own use (*t*). But if a deer, or other wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken and marked, and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him (*u*); which agrees with the opinion of Grotius, (before cited) that the owner of animals reclaimed *per industriam* does not lose his property therein by the mere act of such animals escape out of his actual possession, where the owner does any act to rebut the presumption

(*r*) Inst. l. 2. t. 1. 15.

(*s*) L. 2. c. 1. p. 9.—and see the case of Swans, 7 Rep. 17.

(*t*) Finch L. b. 2. c. 17. p. 177.

(*u*) Blac. Com. 2 Y. 392.—Case of Swans, 7 Rep. 16.—and see Grotius b. 2. c. 8. § 3.

* Dionysius Gothofredus will not allow peacocks to be *feræ naturæ; vide* his note upon the Inst. l. 2. t. 1. 15 d. but see Vinnius Com. on the same passage.

that

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that he has given up all hopes of recovering the possession of such animals: but if the swan leaves the neighbourhood, or the deer has been long absent, so that all reasonable hopes of his return are gone, the former owner has no longer any property in him (*x*.)

Bees also are *feræ naturæ*, and consequently when in actual possession may be the subject of a qualified property; but whether such qualified property may be acquired *per industriam hominis*, by hiving and reclaiming them, or exists only *ratione soli* is a point upon which the books are at variance.

Puffendorf lays it down, "that bees are no doubt "wild by nature, since their custom of returning to the "hive, doth not proceed from their familiarity with man-"kind, but from their own secret instinct: they being "in all other respects utterly unteachable (*y*)." Pliny asserts that bees are neither wild nor tame (*z*); whilst others consider them to be of both kinds; thus the Digest (*a*) speaks of "*apes feræ*," which are not the subject of theft, in contradistinction to tame bees, which obviously are; but I apprehend the distinction between wild and tame bees, as different in species, to be totally without foundation.

All bees are no doubt wild by nature, but when hived and reclaimed there seems to be no good reason why a qualified property may not be had in them as well as in deer or any other animals *feræ naturæ*. Indeed in very early times we read of them as the subject of property; thus, one of Plato's laws directs that whoever deprives another of this species of property, either by pursuing them, or striking upon brass to entice them by the sound,

(*x*) 2 Blac. Com. 392.
(*y*) L. 4. c. 6. § 5.
(*z*) His. Nat. l. 11. c. 5.
(*a*) L. 47. t. 2. l. 26.

should

should make restitution for the damage (*b*). And while bees are reclaimed, and return regularly to the hive, they were so far considered as the property of the owner by the Roman law, as to entitle him to legal redress against any one who might injure them, as appears from Quintilian's oration, entitled "The Poor Man's Bees" (*c*). And the manner of acquiring this property is expressly stated in the Institutes to be by hiving and enclosing them; "*Apium quoque fera natura est. Itaque apes quæ in* "*arbore tua consederint, antequam à te alveo inclu-* "*dantur, non magis tuæ intelliguntur esse quam volucres,* "*quæ in arbore tua nidum fecerint; ideoque si alius* "*eas incluserit: is earum dominus erit* (*d*)." This passage is literally copied by Bracton, who adds, "*Exa-* "*men etiam quod ex alveo meo evolaverit eò usque meum* "*esse intelligitur quamdiu in conspestu meo est, nec sit* "*impossibilis ejus persecutio est, alioquin occupantis* "*fit*" (*e*): in which he has also followed the civil law (*f*); but even should they escape, and any one seize them, he does not thereby acquire any property in them if he know them to be another's; but such taking is esteemed a theft, unless taken with the design of restoring them to the true owner (*g*), which is a confirmation of the opinion of Grotius, that property in animals *feræ naturæ* may subsist even after they have recovered their natural liberty, without the intention of returning, whilst there is any hope of recovering them, as from the circumstance of their having what the lawyers call "an ear mark," or their being, by any other means generally known to be-

(*b*) De Leg. l. 8.
(*c*) Decl. 13.
(*d*) Inst. l. 2. tit. 1. § 14. and see Ff. l. 41. tit. 1. l. 5.
(*e*) Lib. 2. c. 1. § 3.
(*f*) Ff. l. 41. tit. 1. 4.
(*g*) Bracton *supra*.

long

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long to any individual, for by these means the chance of recovering the fugitives is greatly increased.

Notwithstanding the authority of Bracton and the civil law, it is said in Brook's Abridgment (*h*), that the only ownership of bees is *ratione soli*; and the charter of the forest (say's Mr. Justice Blackstone (*i*)), which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found. But it would rather seem, that what is said by Brook, must be intended of bees unreclaimed, of which the qualified property may be in the owner of the soil on which they are found, as fish in a river, in which a man has a several fishery, in which case he has a qualified property in the fish while they remain within the limits of his fishery, *ratione soli;* and it is worthy of remark, that Brook's observation is general, that no property can be in animals *feræ naturæ, as fish, bees, &c.* except *ratione soli;* but I think this passage in Brook will hardly be vouched to prove that a man cannot have a property in fish enclosed in a pond; though it will be as good an authority for that purpose, as to prove that the property of *all bees* must be *ratione soli.*—As to the charter of the forest, that only gives the *honey* to the owner of the forest, which had the property of the bees been in him would have been unnecessary: from this charter therefore it may rather be inferred, that not only the bees, but their produce were considered as common property. Had it been understood as either recognizing or confirming a right to the bees in the owner of

(*h*) Tit. Propertie 37. cites 43 Edw. 3d. 24.

(*i*) 2 Com. 393.

the

the soil, to the exclusion of all others, it would surely not have escaped the notice of Bracton, whose book was written shortly after the making of the charter of the forest *.

In support of the opinion that a property may be acquired in bees by hiving and reclaiming them, we may refer to the Register (*k*), where there is a writ of *replegiare facias* for a swarm of bees. Now it is laid down by Lord Coke, that a distress must be of a thing whereof a valuable property is in somebody, therefore animals *feræ naturæ* are not distrainable (*l*), unless *reclaimed*; for then if taken the owner may have a replevin (*m*).

A qualified property *propter impotentiam*, may also subsist with respect to animals *feræ naturæ*; as where hawks, herons, or other birds build in a man's trees, or coneys, or other creatures make their nests or burrows, in his land, and have young ones there, he hath a qualified property in such young ones, till such time as they can fly or run away, and then such property expires (*n*); in this case, as the owner of the land has it in his power to do what he pleases with such animals the law vests a property in him of the young ones, in the same manner as it does of the old ones, if reclaimed and confined: for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him (*o*).

(*k*) P. 81, and see also, F. N. B. 68 E.

(*l*) Co. Lit. 47. b.

(*m*) Roll. Abg. tit. Repl. A. 430.--Bro. Abg. tit. Repl. pl. 64.--Doc Pla. 314.

(*n*) *Carta de foresta*, 9 H. 3. c. 13.—F. N. B. 86 L. 89 K.—Case of Swans, 7 Rep. 17.

(*o*) 2 Blac. Com. 394.

* Bracton wrote in the latter part of the reign of Henry the 3d, and the Charter of the Forest was passed in the 9th year of the same reign.

Lastly

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Lastly a man may have a qualified property in wild animals *ratione privilegii:* that is, he may have the privilege of hunting, taking and killing them, in exclusion of all other persons, as by reason of a park, warren, &c. But in such case (it is said (*p*)), a man hath no property in the deer, conies, pheasants, or partridges; and therefore in an action *Quare parcum warrennum, &c. fregit &c. et tres damas, lepores, cuniculos, phasianos, perdices, cepit & asportavit*, he shall not say *suos*, for he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure, so long as they remain in the privileged place.

Where a qualified property is acquired in animals *feræ naturæ* either *per industriam* or *propter impotentiam*, it will be seen that such property is, in its nature possessory (*q*), and by consequence may be the object of a sale, gift, &c; but with respect to property subsisting *ratione privilegii*, the case is different: the transient property which by this means may be acquired in animals *feræ naturæ*, not being accompanied by possession cannot be transferred by sale, though the privilege itself may. But as such privilege is in the nature of a franchise, the manner in which it may be transferred would be foreign to the subject of this work, which is confined exclusively to the sale of personal chattels. If however the owner of the franchise reduce the animals into possession by taking or killing them, it is almost needless to observe, that such property may then be transferred from hand to hand, in the same manner as other personal property, unless such right is restricted

(*p*) Case of Swans *ante*.—3 H. 6. 55. b. b.—F. N. B. 86. L. 89. K.—Doc. Pla. 314.

(*q*) Case of Swans, 7 Rep. 17.

by

by statute, as in the case of game, as we shall have occasion to observe in the sequel.

A qualified property may also be had in personalty on account of the peculiar circumstances of the owner, where the thing itself is capable of absolute ownership. Thus, bailees, as carriers, agisters of cattle, &c. (*r*), have a qualified property in the thing bailed; so a Lord who seizes a wreck or estray hath a special property therein before the year and day expired (*s*). A sheriff also has a special property in goods seized in execution (*t*); so an auctioneer, a factor, or other consignee, a trustee, or pawnee (*u*) may all have a special property in goods. But care must be taken to distinguish between a bailee, and a mere servant who has the care of his master's goods, as a butler of plate, a shepherd of sheep, and the like, who have no property either absolute or qualified, but only a charge or oversight (*x*): for it is said, that if a bailee or other person who has a special property, sell *and deliver* the goods to another *bonâ fide*, and without notice, the general owner cannot maintain trover or any other action against the vendee; because by such a sale by a person who has a special property in, and possession in fact of the goods, the property of the general owner is altered (*y*); but this is true only in the case of a naked bailment, on account of the confidence which the bailor has

(*r*) Bro. Tres. 92.

(*s*) Sir Wm. Courtney's case, C. B. Salk. MSS. 88—Pye and Pleydell Bucks. 1750. *per* Clarke Bar. S. P. Bull N. P. 33.

(*t*) Wilbraham *v.* Snow, 2 Saund. 47.—1 Mod. 30.—1 Sid. 438,—1 Lev. 282.—1 Vent. 52. S. C.—Clerk *v.* Withers 6 Mod. 292.—Williams *v.* Millington.—1 H. Bl. 81.

(*u*) Ratcliff *v.* Davies.—Cro. Jac. 245.—5 H. 7. 1.—Owen 124.

(*x*) 3 Inst. 108.

(*y*) Bro. Trespass 216. 295.—Countess of Shrewsbury's case.—5 Rep. 14.

the

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reposed in the bailee by such *general bailment*, and the law is otherwise where a man bails his goods to another for a *particular purpose* (*z*); as to a carrier, agister of cattle, a wharfinger, &c. thus in a recent case (*a*), where the plaintiff had sent a quantity of lead to the wharf of one Ellil in the borough of Southwark, there to remain till it should be sold. Ellil was accustomed to sell lead from this wharf; but had no authority whatever to sell the lead in question, and never had sold any for the plaintiff before.—Having sold this lead as his own property, to the defendants, who bought it *bonâ fide*, the plaintiff brought trover against them. It was endeavoured to be shewn, that this wharf was *market overt*, as being within the metropolis, and a place where lead was usually sold.—But Lord Ellenborough, C. J. held, that *the sale by Ellil did not change the property* in the lead, and observed that the doctrine contended for, would give wharfingers the dominion over all the goods entrusted to them.—That Ellil had no colour of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion; and the plaintiff accordingly recovered.

So where the plaintiff bailed his goods to A, *for safe custody* only, and A carried them to defendants, and there borrowed of them three hundred pounds, and pledged the goods as his own; it was held that the plaintiffs might maintain trover against the pawnee for such goods, though taken by him *bonâ fide* as the goods of A, without notice of the fraud (*b*).

(*z*) Countess of Shrewsbury's case, *ante*.—Co. Lit. 57. a.—Bro. Trespass 295.

(*a*) Wilkinson *v.* King.-2 Campbell. N. P. C. 335.

(*b*) Hartop *v.* Hoare.—2 Stra. 1187.—1 Wils 8.—3 Atk. 44. S. C.

Where

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There is also another species of property which, with reference to the duration of it, may be classed amongst qualified property, and that is literary property, or the right which an author has to the exclusive profits of his own compositions. Whether such a property subsisted at common law or not, is a point which has called forth the exertions of the greatest lawyers of this country. But how this point stood at common law, is more a matter of curiosity than real utility; for now by the statute 8 Ann, c. 19. (amended by 15 Geo. III. c. 53.) it is declared, that the author or his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer*; unless at the end of that period, the author himself be living, in which case he has another fourteen years. It will be seen from the very terms of these acts, that this sort of property is assignable, and if an author transfers all his right or interest in a publication, and he survives the fourteen years, and thereby becomes entitled to a renewal of the term, the second fourteen years will result to the assignee, and not to the author (*c*); and the proprietors of literary property may protect it by action or injunction, though the work has not been entered at Stationers' Hall pursuant to the directions of the 8 Ann c. 19.—such entry being only necessary to enable the party injured to sue *for the penalties* given by the statute (*d*).

Musical compositions have been held to be within the meaning and protection of these statutes, the words of the statute of Ann being sufficiently large to include such compositions: "*books and other writings*" are the

(*c*) Carnan *v.* Bowles, 2 Bro. Ch. Cases 80.

(*d*) *Per* Lord Mansfield in Tonson *v.* Collins, 1 Blac. 330.—and Beckford *v.* Hood, 7 T. R. 620.

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words made use of.—It is not confined to language or letters. Music is a science and may be *written*, and the mode of conveying the ideas is by signs and marks; the same as algebra, mathematics, arithmetic, hieroglyphics, &c. (*e*). And a musical or other composition is within the statute, though printed on a single sheet (*f*).

The author of any additions or corrections of an old work may acquire a property in such additions or corrections, the same as in an original work (*g*).

The inventor, designer, or engraver of prints, and engravings has a similar property in such production, which was formerly limited to fourteen years (by 8 G. II. c. 13), but is now extended to twenty eight years by 7 G. III. c. 38. which gives the property of all prints and engraving for that term, to all, who either invent the design, or make or print from another's design, or picture; and enacts, that all those who during the term shall pirate or copy such prints, &c. shall forfeit the copies, to be destroyed, and five shillings for each copy; and the 17 G. III. c. 57. superadds an action at the suit of the proprietors for damages and double costs.—But in order to entitle the proprietor to the protection of these statutes, the name of such proprietor must be truly engraved on each plate, and printed on every print, and also the day on which it was published (*h*). And the proprietor may sell and assign his property in a print, and invest his assignee with all his rights (*i*). It should be observed that *an action for damages* may be maintained for pirating a

(*e*) Bach *v.* Longman,—Cowp. 623.

(*f*) Clementi *v.* Golding.—11 East. 244.—2 Campb. N. P. C. 25. S. C.-Storace *v.* Longman, 2 Camp. N. P. C. 27.—Hime *v.* Dale, ibid.

(*g*) Cary *v.* Longman, 1 East. 358.

(*h*) Sayer *v.* Dicey, 3 Wils, 60.—Thompson *v.* Symonds, 5 T. R. 41.

(*i*) Ibid.

print,

print, though the proprietor's name is not inscribed on it, pursuant to 8 G. II. c. 13. § 1. as that statute only gives the penalty of five shillings, and forfeiture of the plate for pirating prints, but the right to bring an action for damages is quite independent of the statute (*k*).

It will be seen that in all the instances of qualified property which have been given in this section, the possession, either actual or constructive, has accompanied such qualified ownership.

It remains now to notice that species of property, which the law calls, a *chose in action*; that is, where the property and right of possession are in one man, and the possession in another; as if A buy of B a horse, or a cow, and pay the price; but the horse or the cow, be not delivered—or if B bind himself in an obligation to pay A one hundred pounds on a certain day, and make default in the payment, a property is thereby vested in A in the sum secured: and in these cases, the horse, the cow, and the hundred pounds, are said to be *choses in action*, and can only be recovered by suit at law.

This right to a thing is considered by the civil law (*l*), and our own, as much the property of the person entitled thereto as if actually reduced into possession; and hence it would appear, that such property might be assigned and transferred from hand to hand in the same manner as property in possession; but as it was thought to have a strong tendency to encourage litigiousness, and maintenance, to allow one man to sell his right of action to another, the old common law prohibited the assignment of a *chose in action* (*m*); and therefore a contract, or right or cause to have an action for any duty or wrong can-

(*k*) Roworth *v.* Wilks.--1 Camp. N. P. C. 94.

(*l*) Ff. lib. 41. tit. 1. 52.

(*m*) Co. Lit. 214. a.-266. a.

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not be assigned, so as to entitle the assignee to sue at law in his own name (*n*). The king is an exception to this rule, for he by his prerogative may either grant or receive a *chose in action*, for the law never could intend that the King would encourage maintenance or litigiousness; and in such case the King's grantee may sue in his own name without any special authority (*o*).

But though the law in this particular still remains unaltered, the courts considering, that in a commercial country, every facility should be afforded to the transfer of property will so far notice an assignment of a *chose in action* as to permit an action to be brought by the assignee in the name of the assignor (*p*), and though the assignor may have become a bankrupt after having made an assignment of a debt, and before the action brought, yet it has been held, that the debt so assigned passed the property to the assignee, and that the assignees under the commission had no title to it; the bankrupt standing at the time of the bankruptcy in the situation of a trustee for the person substantially interested, and that the plea of bankruptcy could not defeat an action brought in the name of the assignor, the whole facts of the case being replied to such plea (*q*). And the courts of equity will protect an assignment of a *chose in action*, as much as *chose in possession* (*r*)*.

(*n*) 2 Roll's Abg. 45. l. 40---46. (G).

(*o*) Prereton's case, Dyer, 30.-Rex *v.* Twine.—Cro. Jac. 180.

(*p*) Delaney *v.* Stoddart, 1 T. R. 26.

(*q*) Winch *v.* Keeley, 1 T. R. 619.

(*r*) Delaney *v.* Stoddart, *supra*.-Lord Carteret *v.* Paschal, 3 P. Wms. 199.

* Bills of Exchange, Bills of Lading, and Promissory Notes, though *choses in action* are assignable by indorsement and delivery, the two former by the custom of merchants, and the latter by statute 3 & 4 Ann c. 9.

SECT.

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SECT. II.

Of Sales where the Vendor hath no *Property in the Thing sold.*

IT must be confessed that there is something anomalous in that class of sales of which it is now proposed to treat.—That a man should be allowed to dispose of the property of another, and that such disposition should vest any property in the vendee does certainly in the abstract, appear inconsistent; yet when we consider the daily and hourly wants of individuals, which can only be supplied through the medium of sales, and the great inconvenience which would ensue, were it necessary for a purchaser in all cases to investigate the title of his vendor to every trifling article he may have occasion to buy, it must be admitted that it is better upon the whole, to submit to the partial inconvenience of a fraudulent vendor now and then disposing of goods in which he has no property, to the injury of another's rights, than that a check should be given to that commercial intercourse between man and man, which can only be upheld by giving to a purchaser, under certain restrictions, a secure title to his purchase.

That a man may acquire by a wrongful act, a power of transferring to a third person the property of another seems not to be peculiar to our laws, for we find it laid down in the Mosaical law, "If a man shall steal an ox "or a sheep, and kill it, or *sell it;* he shall restore five "oxen for an ox, and four sheep for a sheep (*s*)",—thus considering the sale by the thief as ostensible owner, to devest the property of the true owner, as much as the

(*s*) Exodus, c. 22. v. 1.

actual

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actual destruction of the thing stolen, inasmuch as in either case the restoration of it is rendered impossible.

Upon the same principle, upon which our law is founded, of securing an honest purchaser in the quiet possession of the thing conveyed to him, though illegally obtained by the vendor, was the Roman law of Usucaption established (*" Bono publico usucapio introducta est, ne " scilicet quarundam rerum diu, & ferè semper incerta " dominia essent (t)"*): by which a man who had *bonâ fide* bought, or received by gift, or otherwise, any thing of a person who appeared as the owner of it, though in fact he was not so, acquired after the lapse of a certain time, (according to the nature of the property, and situation of the owner,) a perfect and indefesible right to it (*u*); so also by Plato's laws, property might be acquired or rather confirmed by usucaption (*x*).

By our law, however, the vendee's right does not depend on the lapse of time after the sale, but upon the manner of the sale itself; which is directed to be made with a degree of publicity which gives the real owner an opportunity, if not of recovering his goods, at least of discovering the person who may have stolen, or wrongfully obtained them:—thus it is laid down by Lord Coke, as a general rule of law, that all sales and contracts of any thing vendible, in fairs, or markets *overt*, (or open) shall not only be good between the parties; but also be binding on all those who have any right or property therein (*y*); which fairs and markets seem to have been anciently established for the purpose of facilitating the proof

(*t*) Ff. lib. 41. tit. 3. l. 1.
(*u*) Inst. lib. 2. tit. 6. l. 1.—Ff. lib. 41. tit. 3.—Cod. lib. 7. tit. 31.
(*x*) De Leg. l. 12.
(*y*) 2 Inst. 713.

of

of contracts; for which purpose (says the Mirrour) (*z*), tolls were given, for that every private contract was forbidden, inasmuch that the sale of any thing above the value of twenty pence, unless in open market, was prohibited; and every bargain was directed to be contracted in the presence of credible witnesses (*a*). And by a law of William the Conqueror, it was ordered that no one should buy either dead or live goods of the value of four pence without the testimony of four men, either of the borough or vill; and if the thing was challenged, and he had no such testimony, he should not be allowed to litigate the matter, but should restore the goods to the owner (*b*).

By sale then, in market *overt*, property may be transferred, though the vendor hath none at all in the goods sold; but this rule, as to sales in market *overt* Lord Coke tells us, hath many exceptions (*c*).

Thus it shall not bind the King for any of his goods sold in the market *overt* (*d*).

Neither does it extend to sales in a *covert* place within a fair or market, as in a back room or warehouse (*e*).

Or behind a hanging or cupboard, where a person passing before the shop cannot see (*f*)

Or where the windows of the shop are shut (*g*).

Nor to the sale of goods improper and foreign to the

(*z*) Cap. 1. § 3. p. 14.

(*a*) LL Ethel. 10, 12.—LL. Eadg.—Wilk 80.

(*b*) LL. William the Conqueror, 43.

(*c*) 2 Inst. 713.—Doc. and Stu. Dial. 2 c. 3. p. 121.

(*d*) 2 Inst, 713.

(*e*) Ibid.—Case of Market *overt*, 5 Rep. 836.—Anon. Poph. 84.

(*f*) Ibid.—2 Roll. Abg. Tit. Market *overt*, 50, p. 122.

(*g*) 2 Roll. Abg. *ubi supra*.

trade

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trade of the owner of the shop, as plate in a scrivener's shop, and *sic de similibus* (*h*).

Nor to sales by covin, as where the buyer knows that the seller has no right; or that the seller is an infant *feme covert*, &c. unless the sale be of those things, which the *feme covert* usually trades in, by the consent of her husband (*i*.)

Nor to sales between sun-setting and sun-rising, though such sales are binding between the parties (*k*).

Neither does this rule of market *overt* extend to cases where the treaty for the sale was begun out of market (*l*).

Nor to gift in market *overt* (*m*).

Nor to sales to a man of his own goods (*n*); unless the property had been altered by a previous sale (*o*): or even though the property may have been altered, if the goods come again into the hands of the original vendor, for then the owner may stop them (*p*).

Nor to pawns in market *overt*, for there can be no market overt for pawning (*q*); and therefore if goods be stolen and pawned, the owner may maintain trover against the pawnbroker (*r*).

So if a man pursue his *appeal* freshly; against a felon of his goods, till he be convicted, he shall have restitution of his goods, though they have been sold in market

(*h*) Roll. Abg. *ante*. — Case of Market overt, *ante*.— Anon. Pop. 84.—Taylor *v*. Chambers, Cro. Jac. 69.

(*i*) 2 Inst. 713.—Doc. and Stu. Dial. 2. c. 47.

(*k*) 2 Inst. 714.

(*l*) Ibid 713.

(*m*) Ibid.

(*n*) Ibid.

(*o*) Perk, § 93.

(*p*) 2 Inst. 713.

(*q*) Hartop *v*. Hoare, 2 Stra. 1187.—1 Wils. 8.—3 Atk. 44. S. C.

(*r*) Packer *v*. Gillies.--2 Camp. N. P. C. 336, n. And see 1 Jac. & T. c. 21.

overt

overt (*s*); but by common law the owner of the goods was only entitled to restitution when he prosecuted the party by appeal; but if he neglected to appeal the felon, and he was afterwards convicted of the felony by indictment at the King's suit, he lost his goods for his neglect in not making fresh suit, and the policy of the law was to compel the party robbed to prosecute the felon. But now by stat. 21 H. VIII. c. 11. it is enacted, "That if any "do rob or take away the goods of any of the King's "subjects within this realm, and be *indicted*, arraigned, "and found guilty thereof, or otherwise attainted by "reason of the evidence of the party so robbed, or "owner of the said money, goods and chattels, or any "other by their procurement, that then the party so "robbed, or owner, shall be restored to his money, "goods, or chattels, and the justices before whom such "person shall be so attainted, or found guilty, by reason "of the evidence of the party so robbed, or owner, or "by any other by their procurement, have power to "award writs of restitution, for the said money, goods, "or chattels, in like manner as though any such felon "or felons, were attainted at the suit of the party in an "appeal."

This act Lord Hale (*t*) says, was made to encourage persons robbed to pursue malefactors, and therefore they have an assurance of restitution, and it would be small encouragement if a thief by sale in market *overt* should elude it, and therefore, (though it was formerly doubted) it is held for law at this day, that sale in market *overt* shall not be allowed against the writ of restitution upon

(*s*) 2 Inst. 714.—3 Inst. 242.—Foxley's Case, 5 Rep. 110.—Staunf. P. C. l. 3. c. 10. p. 165.—1 Hale, His. P. C. c. 47. p. 539.

(*t*) 1 His. P. C. c. 47. p. 543.

this

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this statute (*u*). And although it may sometimes happen, that this rule may be hard upon individuals, and that a man may lose that which he came by *bonâ fide* in market *overt*, yet *spoliatus debit ante omnia restitui*; and the old rule *caveat emptor* holds here. And when two rights clash the ancient right is to be preferred (*x*).

It is now usual for the court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods as are brought into court, or the party may peaceably retake his goods, wherever he happens to find them (*y*); or if the felon be convicted on the evidence of the owner of the goods, and afterwards have his clergy, or be pardoned, the owner may bring trover against him (*z*), or against any one in whose possession the goods may be found after the conviction; but no *action* will lie against a man who may have purchased them *bonâ fide* in *market-overt*, and *sold them again before the conviction*, notwithstanding the owner gave him notice of the robbery while they were in his possession (*a*).

So that, where goods are feloniously stolen, a sale in market-overt shall not bind the owner, if he prosecute the felon to conviction or outlawry—but in cases where such conviction becomes impossible, it is sufficient that he use his utmost endeavours; as if he take the felon and imprison him, and he die before trial (*b*).

But, where no conviction takes place or is avoided by such means, the owner of the goods is concluded by a sale in market *overt*.

(*u*) 2 Inst. 714.—Kelynge 48.

(*x*) 2 Inst. 714.

(*y*) 2 Roll's Abg. tit. Trespass, (I). 565-6.—Higgins *v.* Andrews, 2 Roll. Rep. 55.—1 Hale, His. P. C. 546.

(*z*) Dawkes *v.* Caveneigh, Style, 346.—Markham *v.* Cobbe, Noy 82.

(*a*) Horwood *v.* Smith, 2 T. R. 750.

(*b*) 1 Hale's His. P. C. c. 47.

And

And, as no property is gained in goods taken *piratice* (*c*), if a pirate sell the goods so taken, out of market, the owner may retake them (*d*); but if they are sold in market *overt* the property is bound (*e*); and so of goods obtained by false pretences, for they are not protected by the statute *.

And a sale in market *overt* shall bind the owner of the goods; though such owner be an *infant*, *femecovert*, *non compos*, in *prison*, or *beyond sea* (*f*).

And shall alter the property though no toll be paid (*g*).

It may here be proper to state shortly what shall be considered as market *overt*, which in the country is usually held on some particular days in each week, which are either specified in the charter, or established by pre-

(*c*) Grot. de J. et P. l. 3. c. 9. § 16.

(*d*) *Per* Dodderidge, J. in Rex *v.* Marsh, Buls. 29.

(*e*) Spanish Ambassador *v.* Joiliff, Hob. 79.

(*f*) 2 Inst. 713.

(*g*) Ibid 714.—Case of market overt, 5 Rep. 83.

* And if goods are obtained under false pretences, and afterwards pawned, it seems the pawnee is entitled to retain his lien against the true owner though he prosecute the offender to conviction: thus in a case (*a*) where it appeared that certain goods had been obtained from the defendant by false pretences, and afterwards pawned to the plaintiff for a valuable consideration, without notice of the fraud; that the person obtaining them had been convicted by the defendant, on which the latter got possession of the goods again; and the action was brought by the pawnbroker to recover them from the defendant; and a verdict having been found for the plaintiff, it was moved to enter a nonsuit. But the court said, the case was distinguishable from the case of felony; for there by a positive statute (*b*) the owner, in case he prosecutes the offender to conviction, is entitled to restitution: but that does not extend to this case, where the goods were obtained from the defendant by a fraud.

(*a*) Parker *v.* Patrick, 5 T. R. 175

(*b*) 21 H. 8. c. 11.

scription,

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scription, which supposes a charter, without which there can be no market (*h*); the usual place where a market is held is the market, and not every place within the town (*i*); the same may be said of fairs, for every fair is a market, but not *è contra*, and therefore, where any statute speaks of a market, a fair shall also be comprehended (*k*). But in London it is otherwise, for there every day (except Sunday) is market day (*l*), and every shop in which goods are exposed to sale is market *overt* for such things only as the shopkeeper is in the habit of dealing: and this is by the custom of London, which was certified by Lord Coke when he was recorder (*m*), and therefore will now be judicially noticed by the courts (*n*): but a *wharf* in London is not within the custom, and cannot be considered market *overt* for articles which are usually sold there (*o*).

But as this law of market overt might be greatly abused, from the great facility which in London is afforded to a dishonest person to dispose of goods wrongfully obtained to pawnbrokers and others; it is enacted by statute 1 Jac. I. c. 21, that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property.

Before we quit this subject it will be proper to observe that there is one species of personal chattels in which the property is not easily altered by sale, even in market *overt*, without the consent of the owner, and that is

(*h*) 2 Inst. 220.
(*i*) Anon. Godb. 131.
(*k*) 2 Inst. 406, 221.
(*l*) Taylor *v.* Chambers, Cro. Jac. 68.—Anon. Pop. 84.
(*m*) Case of market overt, 5 Rep. 83.
(*n*) Doc. and Stu. Dial. 1. c. 10.—Blacquire *v.* Hawkins, Dougl. 380.
(*o*) Wilkinson *v.* King, 2 Campbell, N. P. C. 336.

horses:

horses: for by statutes 2d and 3d Ph. and M. c. 7. and 31 Eliz. c. 12. no sale of any horse that has been stolen changes the property, unless it stand, or be ridden, an hour together, between ten o'clock in the morning and sun-set, in an open part of the market, to be set apart for that purpose, and all the parties to the bargain appear with the horse before the toll-gatherer, who must enter in a book the names and dwelling-places of such parties properly attested, and the price, colour, and one mark, at least, of the horse. And if the owner, within six months after the horse is stolen, put in his claim before some magistrate, where the horse shall be found; and within forty days more prove his property by the oath of two witnesses, and tender to the person in possession such price as he *bonâ fide* paid for him in market *overt*; he shall, notwithstanding the sale has been perfected as the act directs, have his horse again. But in case any of the directions of such act be not complied with, the sale is absolutely void; and the owner shall not lose his property, but may at any time retake his horse wherever he may happen to find him, or bring an action for him, at his election.

These statutes extend to horses taken by wrong, though not stolen (*p*).

And it has been decided, that if the seller of a stolen horse, in market *overt*, be entered in the toll-book by a false name, the property is not altered (*q*): though a contrary doctrine is held in Wikes *v.* Morefoots (*r*). But the former seems to be the better opinion—for the misnomer of the vendor in a great measure defeats the object of the statute, and tends to mislead the owner of a stolen horse in his search.

(*p*) 2 Inst. 717.
(*q*) Gibbs' case, Owen. 27.—1 Leon. 158. S. C.
(*r*) Cro. Eliz. 86.

CHAPTER

CHAPTER THE FOURTH.

OF SALES, WITH RESPECT TO THE MANNER OF CONTRACTING.

CHAP. IV. IN the First Chapter we have seen the nature of Sales in general, and the usual requisites to the completion of the contract. It will be the business of this chapter to point out the different modes of contracting sales, which are recognized by the law of England, in compliance with legislative enactments or universal usage. The contract of sale will accordingly be treated of under the following heads; as contracted

1st—By Deed.
2d—By Parol.
3d—Under the Directions of particular Statutes.

SECT. I.

Of the Contracts of Sale by Deed.

The alienation of personal chattels by deed, though sometimes made, is by no means usual, except in particular cases, as where a man bargains and sells all his goods and chattels, or when the sheriff conveys goods seized under an execution, &c. in which cases the property is tranferred by an instrument called a Bill of Sale, in which the particular goods sold are usually specified either in the body of the instrument or in a schedule subjoined. And in such cases where the immediate delivery

very of the thing sold is possible, such delivery is necessary to give a sure title to the buyer; for although the sale as between the vendor and vendee is binding without such delivery, as the property of the goods passes by delivery of the deed (*a*); yet if the vendor continue in possession, as ostensible owner of the goods,× and afterwards become bankrupt, they will be assigned by the commissioners under the commission, as being in the possession, order, and disposition of the bankrupt, within the statute 21 Jac. I. c. 19. § 11. which enacts, "That if any "person shall become bankrupt, and at such time as "they shall so become bankrupt, shall, by the consent "and permission of the true owner and proprietary have "in their possession, order, and disposition, any goods "or chattels whereof they shall be reputed owners, and "take upon themselves the sale, alteration, or dispofi-"tion as owners; that in any such case the com-"missioners, or the greater part of them, shall have "power to sell and dispose of the same, to and for the "benefit of the creditors which shall seek relief by the "commission, as fully as any other part of the estate "of the bankrupt."

This statute was made to prevent traders from deceiving the world by holding out a false appearance of wealth which they did not in fact possess, and by that means gaining credit.

It has been determined that a mortgage of goods and assignment of *choses* in action, are within the meaning of this statute, and fraudulent as against creditors, if the goods, &c. be not delivered (*b*).

(*a*) Noy's Max. c. 42. 1 Atk. 165.—and 1 Wils. 260.
(*b*) Ryall *v.* Rolle, 1 Vez. 348.— S. C.

× Where the vendor remains in possession jointly with the servt. of the vendee, the assignment is void as agt. credrs, and the goods may be taken in excon. Wordall v. Smith and Cand., Sheriff of Middx. 1 Camp. 333 But where the trustee of the separate estate of a wife, purchases effects under an excon agt. the husband, the

It

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It would be foreign to the purpose of this treatise to enter into detail of all the cases which have been determined upon this statute * ; it is sufficient for the present purpose to observe, that whenever the vendor is suffered to keep possession of the goods under circumstances which give the reputation of ownership, the case is within the statute (*c*), and consequently the sale is void as against creditors. Hence the question in these cases must necessarily, as was observed by Mr. Justice Buller, in Walker *v.* Burnell (*d*), be rather a question of fact than of law: and therefore it is the province of the jury to say, whether under the circumstances, the bankrupt had the reputed ownership of the goods (*e*).

In the case of goods, either sold or mortgaged, they ought to be delivered specifically, or the key of the warehouse where they are, &c. with the possession thereof; and the delivery of the muniments, books and writings, relating to *choses in action*, and enabling the vendee or mortgagee to reduce the same into possession by suit or action is tantamount to a specific delivery of goods. And if a bond be assigned, the bond must be delivered, and notice must be given to the debtor, but in assignment of book debts notice alone is sufficient, because there can be no delivery (*f*).

But should the vendor not become bankrupt, and the goods sold appropriated to the use of his creditors, under

(*c*) *Per* Eyre, C. J. in delivering the judgment of the court in Lingham *v.* Biggs, 1 Bos. and Pull. 87.

(*d*) Dougl. 317.

(*e*) *Per* Lawrence, J. in Horn *v.* Baker, 9 East 241.

(*f*) Ryall *v.* Rolle, 1 Vez. 348.—1 Atk. 165.—1 Wils. 260. S. C.

* The leading cases on this statute will be found in Cook's Bank. L. c. 9. § 11. and also in Selwyn's N. P. Abg. p. 226.

the statute of Jac. I., still the sale, when the goods are suffered to remain in the possession of the vendor, may be avoided under the statute 13th Eliz. c. 5, which is stated to be made, " for the avoiding and abolishing of " feigned, covinous and fraudulent feoffments, gifts, " grants, alienations, conveyances, bonds, suits, judg- " ments, and executions, as well of lands and tenements " as of goods and chattels—which feoffments, &c. had " been and were devised and contrived of malice, fraud, " covin, collusion or guile, to the end, purpose and in- " tent, to delay, hinder, or defraud creditors and " others of their just and lawful actions, suits, debts, " accounts, damages, penalties, forfeitures, heriots, mor- " tuaries and reliefs, not only to the let and hindrance of " the due course and execution of law and justice, but " also to the overthrow of all true and plain dealing, " bargaining and chevisance between man and man, " without which no commonwealth or civil society can be " maintained or continued."

It was therefore " declared, ordained and enacted, " that all and every feoffment, gift, grant, alienation, " bargain, and conveyance of lands, tenements, heredi- " taments, goods and chattels, or of any of them, or of " any lease, &c. that then was, or at any time thereafter " should be had or made, to or for any intent or pur- " pose before declared and expressed should be from " thenceforth deemed and taken (only as against that " person or persons, his or their heirs, successors, exe- " cutors, administrators and assigns, and every of them, " whose actions, suits, debts, accounts, damages, penal- " ties, forfeitures, heriots, mortuaries, and reliefs, by such " guileful covinous and fraudulent devices and practices " aforesaid, were, or should or might be in any wise " disturbed, hindered, delayed or defrauded) *to be clearly*

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" *and utterly void*, frustrate and of no effect; any pre-
" tence, colour, feigned consideration, expressing of use,
" or any other matter or thing to the contrary notwith-
" standing."

It will be seen that there is a great difference between this statute and the before-mentioned statute of James, upon which the only question that can arise is the fact of the vendor's *possession as owner;* but by this statute all sales made to defraud creditors, are made void as against them, hence the fraudulent intention is the principal question in cases on this statute, and though the vendor's continuing in possession of the goods, is in itself a badge of fraud, there are many other *indicia* of fraud from which the intention of the parties may be inferred.

Under what circumstances sales have been deemed void as against creditors by the statute of Elizabeth will be seen by the following cases.

The leading case on this statute is Twyne's (*g*), which was determined soon after the passing of the act, and came before the Star-Chamber on an information filed by the Attorney-General against Twyne, for making and publishing a fraudulent gift of goods *. The case appeared to be that one Pierce was indebted to Twyne in four hundred pounds, and was also indebted to C in two hundred pounds; C brought an action of debt against Pierce, and pending the writ, Pierce, being possessed of goods and chattels of the value of three hundred pounds, in secret made a general deed of gift of all his goods and chattels real and personal to Twyne, in satis-

(*g*) 3 Rep. 80. b.

* For the penalty for this offence see the said statute, 13 Eliz. c. 5. § 2.

faction

faction of his debt; notwithstanding which Pierce continued in possession of the said goods, and some of them he sold; and he shore the sheep, and marked them with his own mark: and afterwards C had judgment against Pierce, and issued a *fieri facias*, directed to the sheriff of Southampton, who would have taken the said goods in execution; but Twyne resisted the sheriff by force, and claimed the goods as his property by the said gift, declaring that it was made on a good and lawful consideration. The question was, whether on the whole matter this gift was fraudulent and void by the statute of Elizabeth or not? And it was resolved by the whole court that it was. And in this case (says Lord Coke) divers points were resolved.

1st. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or any thing of necessity; for it is said, *quod dolosus versatur in generalibus.*

2. The donor continued in possession, and used the goods as his own: and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his own proper goods, and a trust is a cover of fraud.

6. The deed contains, that the gift was made honestly, truly and *bonâ fide*; *et clausulæ inconsuetæ semper inducunt suspicionem.*

2dly, It was also resolved, that notwithstanding there was a debt due to Twyne, and a good consideration for the gift; yet it was not *bonâ fide*, for it was accompanied with

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a trust; and a good consideration does not suffice unless it be also *bonâ fide* (*h*).

The following case (*i*) came before the court of King's Bench, on a motion for a new trial form the northern circuit, and was in substance as follows: it was an action brought by the sheriff of Lancashire against the defendants, who had seized the goods in question, which formerly belonged to one Hayes, after they had been taken in execution at the suit of a creditor in April 1787, to whom the sheriff had paid the value. The defendants set up two answers; the first of which only is material to notice here, which was, an assignment dated 16th of August 1786, by Hayes, to two persons for the benefit of such of his creditors as would sign a deed of compromise by a certain time; notice whereof had been published in the county papers. The answer given by the plaintiff to this was, that it was agreed that Hayes should continue in possession till May 1787, he accounting for the profits in the mean time to the trustees; and he accordingly continued in the visible possession of the goods after the assignment, and therefore the transfer was void by stat. 13 Eliz. To this the defendants replied, by showing an undertaking by Hayes to account to those trustees for all the profits of the trade from the date of the assignment. The plaintiff contended, that neither that undertaking, nor the notice in the papers, was sufficient to show the change of property, and therefore the transfer was void by the assignor's continuing in possession. After hearing the case argued, the court thought it right to take the opinion of all the judges upon it, who were unanimously of opinion,

(*h*) And see Cadogan *v.* Kennett, Cowp. 434.

(*i*) Bamford *v.* Baron, 2 T. R. 594. n.

"that

"that unless possession *accompanies and follows* the "deed, it is fraudulent and void (*j*)."

That case was followed by that of Edwards *v.* Harben executor of Mercer (*k*), where the case was, that William Tempest Mercer, in his life-time, and before the execution of the bill of sale herein-after mentioned, was indebted to the plaintiff in the sum of twenty-two pounds eighteen shillings and six-pence, for goods sold and delivered, which sum remained due to the plaintiff at the time of the action brought. Mercer, at the time of the execution of the bill of sale, was likewise indebted to the defendant in the sum of one hundred and ninety-one pounds for money lent. On the 27th of March, 1786, Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at Lewes, by way of security for the said debt. The defendant refused to accept of the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid; to which Mercer agreed, and accordingly on the same day executed a bill of sale in the common form, by which he bargained and sold to the defendant for ever, his household furniture, medicines, stock in trade, (particularly specifying them,) and *all and every the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes.* Immediately upon the execution of the bill of sale, possession was delivered to the defendant, in the manner therein described, viz. by delivery of one cork-screw, in the name of the whole, but in no other manner whatsoever. All the effects described in the bill

(*j*) *Per* Buller, J. 2 T. R. 595. (*k*) 2 T. R. 587.

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of sale remained in the possession of Mercer until the time of his death, which happened on the 7th of April 1786. On the 8th of April 1786, being before the expiration of the fourteen days from the execution of the bill of sale, the defendant entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for two hundred and thirty-six pounds seven shillings and five-pence. Mercer died intestate; and no letters of administration were taken out by the defendant, or by any other person, before the commencement of the action. The question for the opinion of the court was, whether the defendant was entitled to retain the produce of the said effects, or at least the value of one hundred and ninety one pounds, the consideration of the bill of sale: or whether the bill of sale was void as against the creditors of Mercer, and the plaintiff entitled to recover his debt of twenty-two pounds eighteen shillings and six-pence against the defendant, as executor *de son tort?*

On the part of the plaintiff it was contended, that the bill of sale was fraudulent against the creditors of the deceased, and void under 13th Eliz. c. 5, and that consequently the defendant must be considered as an executor *de son tort*—and Twyne's case, Stone *v.* Grubbam (*l*), and Ryall *v.* Rolle (*m*) were referred to.

For the defendant it was urged, that the property of the goods passed immediately to the vendee, the bill of sale being delivered to the vendee himself; and that though it was agreed that he should not take possession for fourteen days, yet that condition could not affect the immediate property which passed by the deed itself, *Co. Lit.* 36, a—but that at all events the defendant claiming a

(*l*) 2 Bulst. 218. (*m*) *Ante* p. 160.

right

right to the goods, could not be considered as executor *de son tort*.

BULLER J. said that the first point had been decided in Bamford *v.* Baron, and observed, that this had been argued by the defendant's counsel as being a case in which the want of possession was only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law, and he said, "that is the point we have considered, and we are all of "opinion that *if there be nothing but the absolute con-* "*veyance without the possession, that in point of law is* "*fraudulent.*"

Judgment for the Plaintiff.

Trespass against the defendants, sheriffs of London (*n*), for taking certain goods under an execution.

The goods had been the property of a Mrs. Spencer, who then kept a public house: the plaintiffs had been her distillers, and claimed under a bill of sale from her.

The defendants had seized under an execution at the suit of another creditor of the name of Bayley.

On the 4th of April Mrs. Spencer had given the bill of sale to the plaintiffs; and a person on their account had entered at seven o'clock in the evening of that day, and taken possession. The bill of sale was of all her effects, including all the liquors in the house, as well as the furniture, &c.

The execution was sent into the house the next day, at the suit of Bayley.

The defence was that the bill of sale was merely colourable; and it appeared in evidence, that the person in possession under the bill of sale had permitted Mrs. Spencer to sell the liquors in the usual way of her trade,

(*n*) Paget *v.* Perchard, 1 Esp. N. P. C. 205.

on

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on the evening of the 4th of April, and to receive the money during that time; and that she had not accounted for it.

The sheriffs had notice of the bill of sale, when the goods were taken by them under the *fi. fa.*

Under these circumstances Lord Kenyon said; that allowing Mrs. Spencer to appear as usual, mistress of the house, and to execute acts of ownership, after having parted with all her property by the bill of sale, was inconsistent with such situation, and a sufficient evidence of fraud, as against *bonâ fide* executions: and he therefore directed a nonsuit.

So when a man took out execution against another, and by agreement between them, the owner was to keep the possession of the goods upon certain terms; and afterwards another obtained judgment against the same man, and took the goods in execution; it was held that he might; and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of possession, and so no alteration made of the property; and Sir E. Northey, who cited this case, said, it had been ruled forty times in his experience at Guildhall, that if a man sell goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held (*o*).

But notwithstanding the general principle laid down in the foregoing authorities, there are cases where, though possession be not delivered *at the time* of the conveyance, it shall not be deemed fraudulent: thus if a bill of sale be made, to take effect at some future time, or upon condition, and so expressed therein; the sale is not void,

(*o*) *Per* Sir E. Northey in Bucknal *v.* Roiston, Pr. in Chan. 287.

though

though possession be not delivered immediately; for the vendor's continuing in possession until such future time, or until the condition be performed, is consistent with the deed, and such possession comes within the meaning of the rule laid down in Bamford *v.* Baron, *as accompanying and following the deed* (*p*).

So where one Brewer (*q*) having shipped a cargo of goods, borrowed of the plaintiffs six hundred pounds on bottomry, and at the same time made a bill of sale of the goods, and the produce and advantage thereof, to the plaintiff.—The Lord Chancellor held that the trust of the goods appeared upon the very face of the bill of sale. And that though they were sold to the plaintiffs, yet they trusted Brewer to negociate and sell them to their advantage, and that Brewer's keeping possession of them was not to give a false credit to him, but for a particular purpose agreed upon at the time of sale.—And therefore the possession of Brewer was consistent with the deed, and not void by the statute.

The following case also is directly in point.—It was an action of trover (*r*) brought by the plaintiffs, who were trustees under the marriage settlement of Lord Montfort against Mr. Kennett, who was a judgment creditor of Lord Montfort's, and the other defendants, who were sheriffs officers, to recover certain goods taken by them in execution under a *fieri facias*. The case appeared to be, that Lord Montfort, being considerably in debt, by settlement made before marriage, in consideration of the marriage, and of ten thousand pounds his wife's fortune, which was supposed to be more than the amount

(*p*) *Per* Buller, J. in Edwards *v.* Harben, 2 T. R. 596.—and see Stone *v.* Grubbam, 2 Bulst 218.

(*q*) Bucknal and others *v.* Roiston. Pr. in Chan. 287.

(*r*) Cadogan *v.* Kennett, Cowp. 432.

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of his debts at that time, had conveyed all his real estate, and likewise all his household furniture (his real estate alone not being thought an adequate settlement) in trust for himself for life, remainder to his wife for life, remainder to his first and other sons, in strict settlement. The lady being a ward of Chancery, the settlement was approved of by the master, and the goods enumerated in a schedule. Lord Montfort after the marriage continued in possession of the goods; after which, the defendant, who was a creditor of Lord Montfort at the time of the settlement, took them in execution.

At the trial Lord Mansfield inclined to think, that the settlement being made under a treaty with the Court of Chancery, and approved of by the master, was a *bonâ fide* transaction, and that the possession of Lord Montford was *not fraudulent*, because it was *in pursuance* and in execution of a *trust*.

The jury accordingly found a verdict for the plaintiff, and upon a motion for a new trial, Lord Mansfield, after stating the question, said—"he had thought much of "this case since the trial, and in every light in which he "had considered it, he had not been able to raise a "doubt,"—and he said, the statute does not militate against any transaction *bonâ fide*, and where there is no imagination of fraud. But if the transaction be not *bonâ fide*, the circumstance of its being done for a valuable consideration, will not *alone* take it out of the statute; and that he had known several cases where persons have given a fair and full price for goods, and where the *possession* was *actually changed*; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void.—That there was no suggestion of any intention to defraud, or the most distant view of disappointing any creditor, for the master in Chancery and

and the Great Seal could have no fraudulent view.—And as to the argument drawn from the possession; it was a *part* of the *trust*, that the goods should continue in the house. The rest of the court concurring in what had fallen from the Chief Justice, the

Rule was discharged (*s*).

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So (*t*) where a deed of trust conveyed the lease of a farm, and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustee's demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper *, the surplus to be holden for the benefit of the grantor's wife, (whose property the bulk of it originally was) as a separate maintenance for her, she being obliged to separate from him on account of ill usage. It was held that this deed was not fraudulent or void as against creditors, it appearing to have been made *bonâ fide* at the time.

Thus much of sales made by the owner himself; under which we have seen, it is not, *in all cases*, necessary

(*s*) And see Foley *v.* Burnell.—Cowp. 435. (in note)—Jarman *v.* Woolloton, 3 T. R. 618. — and Haeslinton *v.* Gill, ibid. 620.

(*t*) Nunn *v.* Wilsmore, 8 T. R. 521.

* It appeared, that an advertisement was inserted in the country-papers for creditors, and that *all who applied were paid;* the discretionary power given to the trustees, may fairly be presumed not to have been given with any intention that any just creditors were to be excluded, at their option, but merely that they should exercise their discretion in ascertaining what were just debts; a caution which may have been suggested by the conduct of the grantor, who it appeared was an extremely dissipated man.

that

CHAP. IV. that the vendee should take immediate possession; *a fortiori*, where the party *bonâ fide* takes a bill of sale from a sheriff under an execution for a just debt—thus:

Where the (*u*) goods of A being taken in execution, and put up to sale, B became the purchaser, and took a bill of sale of the sheriff, *but permitted* A *to continue in possession.* A then executed another bill of sale of the same goods to C, a creditor, under which the latter took possession of the goods, and sold them, notwithstanding B gave him notice of his prior title: whereupon B brought an action against C, for the produce of such sale, as money had and received to his use. It was held that the first sale was valid, though A continued in possession, and Lord Eldon, C. J. said. If the plaintiff had lent money to A to buy these goods, and had then taken a conveyance of them as a security for his debt thus arising out of the mere act of lending the money, leaving A in possession of the goods it would not have been a fraudulent act, and he cited, Buller's *Nisi Prius*, p. 258. and this appeared a stronger case, by the public buying of the sheriff. And the transaction being found by the jury (to whom that point was particularly left) to be *bonâ fide*, a rule *nisi* for setting aside the verdict, which had been found for the plaintiff, was refused.

Thus the not taking possession, though it is in some measure indicative of fraud, is not conclusive: but to make a sale absolutely void, there must be something to shew the deed fraudulent in the concoction of it. It is incumbent on the person claiming title, to shew that the transaction is *bonâ fide* (*x*).

(*u*) Kidd *v.* Rawlinson, 2 Bos. and Pull. 59.—3 Esp. N. P. C. 52. S. C. And see ~~Bull. N. P. 257, 8. 2 T. R. 587, 94.~~ Pothier, Traité du Contrat de Vente, p. 5. c. 1. num. 321.

(*x*) *Per* Lord Ellenborough, in Hoffman *v.* Pitt, 5 Esp. N. P. C. 25.

In

In addition to these decisions, it may be well here to add, Lord Coke's advice to purchasers (*y*) from a person indebted to others, at the time of the conveyance.

"1st Let it (the sale,) be made in a public manner, "and before the neighbours, and not in private, for se- "crecy is a mark of fraud."

2. "Let the goods and chattels be appraised, by good "people, to the very value, and take a *gift in particular* "in satisfaction of your debt."

3. "Immediately after the gift, take the possession of "them: for continuance of the possession in the donor is "a sign of trust."

SECT. II.

Of the Contract of Sale by Parol.

BY the law of England, all contracts not under seal are considered as parol contracts, though reduced to writing, and signed by the contracting parties; and in truth, such contracts in their nature seem to be more evidences of a previous contract, than the contract itself; thus we find them generally expressed in the past tense, as in the common sale-note, the words, "bought, and sold," are always used. And being therefore considered as memorandums of the terms of a contract, previously entered into by parol, they are construed according to the apparent intention of the parties, to be collected from such memorandum, with reference to the circumstances under which the contract was entered into: thus, the words "bought and sold" in a sale note, have been construed to mean, "agreed to buy and to sell:"

(*y*) In Twyne's case, 3 Rep. 81 a.

where

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where, from the nature of the contract, such appeared to have been the intention of the parties (z).

As the contract of sale by deed, is seldom resorted to in commercial transactions (except under particular circumstances) it is by means of parol contracts, that the daily changes of property in the mercantile world are effected; which are either perfected by immediate payment and delivery, or (as is more frequent in sales to a large amount) reduced into writing by the auctioneer or broker with whom such contract is made, as we have had occasion to observe, when speaking of the statute of frauds, in the first chapter.

There is also another method of transferring property which has not been noticed; by indorsement of a bill of lading. As by far the greater part of the property in the commercial world, depends upon such transfers, it is material to form a just idea of the principles upon which they stand;—let us see the nature of this document. It is an acknowledgment under the hand of the captain of a ship, on board of which goods are loaded, that he has received such goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable by the custom of merchants, and by indorsement and delivery, the property is vested in the assignee (a).

We have seen, when on the subject of delivery, that the bill of lading is the evidence of ownership in the goods; for the property vests as completely in the consignee in a bill of lading, by the shipment of the goods, and delivery of such bill of lading, as by the delivery of the

(z) Boyd v. Siffkin, 2 Campb. N. P. C. 328.

(a) Lickbarrow v. Mason, 2 T. R. 63. 5 T. R. 686, and the argument of Mr. Justice Buller; 6 East. 21. n.

goods;

goods; though the goods be at sea in their transit (*b*). And therefore if A order goods of correspondents abroad, which are accordingly shipped and consigned to him, the property of the goods is immediately vested in A (*c*).—So if a correspondent abroad take bills of lading for the goods, by which they are made deliverable to his own order, and transmit them to A without indorsement, the property of the goods vests in A notwithstanding, if the shipment appear to have been made on his account and risk (*d*); so also if the bill of lading be indorsed by the shipper in blank, the person to whom the same is transmitted, may by the usage of merchants fill up such blank with words ordering the delivery of the goods or contents of such bill of lading to be made to himself (*e*); but that is only where the goods are shipped on account of the consignee, or he has a beneficial interest in them for a valuable consideration. But the mere indorsement of a bill of lading, without consideration, to an agent to enable him to receive the goods on account of his principal, or to stop them *in transitu*, vests no property in such naked consignee. And Lord Ellenborough in Waring *v.* Cox, said, that no case has gone so far as to decide, that a bill of lading is transferrable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods *primâ facie* passes the property in them to the indorsee; and he added, that much confusion had arisen from similitudinary reasoning upon this subject, and that there must be value upon the indorse-

(*b*) Wiseman *v.* Vandeputt.—2 Vern. 203.—Evans *v.* Martlett, 1 Ld. Raym. 271, 12 Mod. 156.—3 Salk, 290. S. C.—Godfrey *v.* Furzo, 3 P. Wms. 186. — and Browne *v.* Heathcote, 1 Atk. 160.

(*c*) Walley *v.* Montgomery, 3 East. 585.

(*d*) Coxe *v.* Harden, 4 East. 211.

(*e*) Lickbarrow *v.* Mason, 2 T. R. 63.—and 5 T. R. 686.

ment

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ment of a bill of lading, or no property in the goods is thereby transferred--so that an assignee without consideration, can maintain no action for the goods (*f*).

But where the goods are shipped on the account and risk of the consignee, we have seen that by the delivery of the goods to the captain, and the bill of lading and invoice to the consignee, the property is vested in the latter, subject however to be devested by the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee: and the property so vested in the consignee may be transferred by him to a third person by indorsement and delivery of the bill of lading during the transit of the goods (*g*).

As the subject of transfer of property by indorsement of a bill of lading is so intimately connected with the right of the consignor to stop *in transitu* that it is impossible to speak of the one without incidentally touching upon the other, it will be most convenient to treat of that important branch of commercial law in this place.

Nothing can be more just and reasonable than that, where a man who has consigned goods to his correspondent upon credit, and before such goods are actually delivered, hears that the consignee has become insolvent, he should be at liberty to resume the possession of his goods, and thus save himself from the loss which he would otherwise sustain.—Upon this principle, the courts of equity (*h*), and subsequently the courts of law, allowed the practice of stopping the goods in their transit to the place of destination upon the insolvency of the consignee,

(*f*) Waring *v.* Cox, 1 Camp. N. P. C. 369.—and see Coxe *v.* Harden, *ante*.

(*g*) Lickbarrow *v.* Mason, 2 T. R. 70.—and Mr. Justice Buller's argument in that case, 6 East. 29. n.

(*h*) Snee *v.* Prescott, 1 Atk. 245. and cited by Mr. Justice Buller in 6 East. 25. n.

Andrew D'Aguila v. Lambert, Ambler, 399.

a practice

a practice in which we may trace something of the spirit of the Roman law (*i*), (which in no case vested the *indefeazible* property in the vendee, till the payment of the price) tempered however, by that leaning which the law of England always has, to afford every facility, consistent with justice, to the transfer of property, which is the life of all commerce.

It will be recollected that the delivery of goods upon a contract of sale, either into the actual or constructive possession of the vendee, vests the property in him, and leaves the seller to his action to recover the price, hence it would seem, that having once parted with the property he would have no farther controul over it; but it is to be observed, that the right of stopping *in transitu* does not depend upon a supposition that the property has not passed from the consignor, but on the contrary, it is founded on an admission that the property has become vested in some other person. No question can ever be made upon the right of a man to seize his own goods; but the question in cases of stoppage *in transitu* generally is, whether under the circumstances the consignor may divest the property which has passed to another, and revest it again in himself (*k*). The right of the vendor to stop goods *in transitu* in case of the insolvency of the vendee is a kind of *equitable lien** adopted by the law

(*i*) Ff. l. 18. tit. 1. l. 53. and l. 14. tit. 4. l. 5 § 18.

(*k*) Abbott on Merch. Shipp. 357.—and Mr. Justice Buller's opinion in Lickbarrow *v.* Mason, 6 East. 27, 28.

* It is not to be inferred from this expression, that the right to stop *in transitu* is merely an equitable right: it is in fact a right strictly legal, by which the *property* is re-vested in the consignor, so as to enable him to maintain trover. See the opinion of Heath J. in Oppenheim *v.* Russel, 3 Bos. and Pull. 49. and of Lord Mansfield, post. p. 179.

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for the purpose of substantial justice, and does not at all proceed on the ground of rescinding the contract (*l*).

And though goods are stopped *in transitu*, if the vendor afterwards offer to deliver them, he may recover the price in an action for goods bargained and sold, which he could not do if, by the stopping *in transitu*, the contract was rescinded (*m*).

But this principle of stoppage *in transitu* will perhaps be best exemplified by the following case.

One Burghall (*n*) at London, gave an order to Bromley at Liverpool, to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship of which the defendant was master, who signed a bill of lading to deliver it in good condition, &c. to Burghall, in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the defendant was ordered on behalf of Bromley, not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned, whereby the cheese should be sent, in which case the shipper was to be at the peril of the seas. The action was brought upon the custom of the realm against the defendant, as a common carrier. Upon this case Lord Mansfield ruled that the plaintiff could not recover, and said he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price has been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the

(*l*) *Per* Lord Kenyon, in Hodgson *v.* Loy, 7 T. R. 445.

(*m*) Keymer *v.* Suwercropp, 1 Camp. N. P. C. 109,

(*n*) Assignee of Burghall *v.* Howard, 1 H. Bl. 365. n.

consignee

consignee, or his assignees *; and that this was ruled not upon the principles of equity alone, *but the laws of property.* And the plaintiff was accordingly nonsuited. CHAP. IV.

By whom and under what circumstances this right can be exercised, will be seen by the following decisions, which naturally resolve themselves into this fourfold division.—1st In what cases goods shall be said to be *in transitu.*—2d When the *transitus* shall be considered at an end.—3dly By whom and under what circumstances this right may be exercised,—and 4thly In what cases the right is defeated during the *transit.*

According to this arrangement then, let us now see in what cases goods shall be said to be *in transitu.*

It is a general rule that the *transitus* in goods continues in all cases until there has been an *actual* delivery to the vendee; for although there are many cases where, as between the vendor and vendee, if no bankruptcy happen, the goods are considered in the possession of the buyer by the delivery to a third person, as a carrier, &c. which, though a delivery to any other purpose, is not such a delivery as will divest the vendor's right to stop *in transitu;* for such right can only be defeated by an *actual* delivery to the vendee †. And therefore goods remain

* This means his assignees under a commission of bankrupt, and not persons to whom the consignee sold the goods, *per* Buller, J. 6 East. 27. n.

† It was said by Lord Mansfield in Hunter *v.* Beal, cited in 3 T. R. 466. that in order to divest the vendor's right to stop *in transitu,* the goods must have come to the *corporal touch* of the vendee; but this was explained by Lord Kenyon in Ellis *v.* Hunt, 3 T. R. 468. to be merely a figurative expression, and that it has never been literally adhered to,—"For" said his Lordship, "there may be an *actual* delivery of "goods without the vendee's seeing them; as the delivery of the key "of the vendor's warehouse to the purchaser." And the present

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main liable to this right of the vendor, not only while they continue in the possession of the carrier, by land or water, but also in any place connected with the transmission of them to the vendee:—thus (*o*), the plaintiff being a ribbon weaver, Messrs. Duhem of Lisle, who had just arrived in London, applied to him for a quantity of ribbons. The plaintiff having received a favourable account of their circumstances from the defendants, packed up goods to a large amount, and delivered them to the defendants to be forwarded to Lisle.—These goods, with others purchased in like manner of other tradesmen, were forwarded on or about the 12th of May to Messrs. Bine and Overman, the defendants' correspondents at Ostend, with directions to send them to the order of Messrs. Duhem. On the receipt of the goods Bine and Overman wrote to Duhems an acknowledgment, and that they waited their directions. On the 12th of June the Duhems stopped payment, and not having fulfilled their engagements with the defendants, and being considerably indebted to them, the defendants by letter of the 31st of May countermanded the orders they had given to Bine

(*o*) Stokes *v.* La Riviere, cited by Mr. J. Lawrence in Bohtlingk *v.* Inglis, 3 East. 397.—and in Ellis *v.* Hunt, 3 T. R. 466.

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learned Chief Justice in Dixon *v.* Baldwin, 5 East. 184. says, (alluding to this decision of Lord Mansfield, "If it be predicated of the vendee's "own actual touch, or of the touch of any other person, it comes "in each instance to a question, whether the party to whose touch "it actually comes be an agent so far representing the principal, as "to make a delivery to him, a full, effectual, and final delivery to "the principal, as contradistinguished from a delivery to a person "virtually acting as a carrier, or mean of conveyance to, or on the "account of the principal, in a mere course of *transit* towards him?" And see what is said by Lord Kenyon in Wright *v.* Lawes, 4 Esp. N. P. C. 85.

and

and Co, as to the delivery of the goods, and directed them to alter the marks, and to deliver them to their order; which was accordingly done, and they were afterwards disposed of in satisfaction of the defendants' demand. They contending that immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. Duhem, and that they (the defendants) had a right to retain them.—Lord Mansfield, before whom the cause was tried, said, that the goods were ordered to be delivered to the defendants *to be shipped* to Duhems, who became insolvent after the goods were sent to a factor at Ostend, and that the defendants having got them back stood as they originally did. "No point is more "clear, than that if goods are sold, and the price not "paid, the seller may stop them *in transitu*:" "I mean" said his Lordship, "*in every sort of passage to the hands* "*of the buyers*. There have been a hundred cases of "this sort. Ships in harbour, carriers, bills, have been "stopped. In short where the goods are *in transitu* the "seller has that proprietory lien. *The goods are in the* "*hands of the defendants to be conveyed:* the owner "may get them back again."

The case of Hunter *v.* Beal (*p*) is to the same effect: that was an action of trover for a bale of cloth, which was sent by Messrs. Steers and Co. of Wakefield, to the defendant, who was an innkeeper, directed to Blanchard and Lewis, to whom the defendant's book-keeper gave notice, that a bale was arrived for them: and Steers and Co. at the same time sent them a bill of parcels by the post, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of Steers and Co. Blanchard and Lewis gave orders to the

(*p*) Cited in Ellis *v.* Hunt, 3 T. R. 466.

defendants

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defendant's book-keeper, to send the bale down to Galley Quay, in order to ship it on board the Union, to be carried to Boston. The defendant accordingly sent the bale to the quay; but, it arriving too late to be shipped was sent back to him. Within ten days afterwards, a clerk of Messrs. Blanchard and Lewis went to the defendant's warehouse, when the defendant asked him what was to be done with the bale in question, and was ordered to keep it in his custody till another ship sailed, which would happen in a few days.—Soon after this Blanchard and Co. became bankrupts; and Steers and Co. sent word to the defendant not to let the bale out of his hands: accordingly when the bankrupts applied for it, he refused to deliver it up.—Lord Mansfield was clearly of opinion that, though the goods might be legally delivered to the vendees for many purposes; yet as to this purpose there must be an absolute and actual possession by the vendees, and that delivery to a third person to convey to them, is not sufficient to divest the vendor's right to stop *in transitu*.

So also if goods consigned to the vendee are delivered to a wharfinger on his account, to be forwarded to him, they are liable to be stopped in the hands of the wharfinger on the insolvency of the vendee; as the following case will shew.

This (*q*) was an action of trover for one cask of madder and one chest of indigo:—the case appeared to be that one Josias Gard, a trader of North Tawton, in the county of Devon, about twenty five miles from Exeter, on the 4th of July, 1799 by letter to the plaintiffs, who were dry salters in London, ordered the goods in question to be sent to him. The plaintiffs accordingly on the 6th

(*q*) Mills v. Ball, 2 Bos. and Pull. 457.

6th of July, 1799, sent the goods by the ship Lively, consigned to Gard, and sent a letter of advice to him, inclosing the invoice, dated the 6th of July, 1799, which letter Gard received in course, and the goods on their arrival at Exeter, were delivered to the defendant, who was a wharfinger there, and received them on Gard's account, and paid the freight and charges, with which he debited Gard, whom he considered liable for any loss which might happen to the goods. Whilst the goods so remained in the wharfinger's hands, Gard becoming embarrassed in his circumstances, on the 16th of September, 1799, wrote to the plaintiffs acquainting them of his difficulties, and offering them to take back the goods if they thought proper: in consequence of which the plaintiffs wrote to their agent at Exeter, to stop the goods in the possession of the defendant, and on the 20th of September the plaintiffs' agent went to the defendant, and tendered him the freight and charges, and demanded the goods on behalf of the plaintiff, but the defendant refused to deliver them as they had been demanded by some of Gard's creditors, he having stopped payment. But he promised not to deliver them out of his custody till he was certain of being safe in doing so. The plaintiffs agent subsequently demanded the goods, and offered to indemnify the defendant, but he refused to deliver them: after which on the 23d of September a commission of bankrupt issued against Gard, and on the 3d of November the defendant delivered the goods to the assignees under the commission.

It was held, that the wharfinger, not having been employed by the vendee, was to be considered as a middle man, and that while the goods were in his hands, they might be stopped *in transitu*; and that the notice to the wharfinger was a sufficient exercise of that right, and the

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the wharfinger having after such notice, and *contrary to his undertaking*, delivered the goods to the creditors of the consignee, was liable to be sued in trover.

And the same right continues in the vendor though the delivery be to a wharfinger named by the vendee (*r*).

So where goods are sent to a packer named by the buyer, the packer is considered as a middle man between the vendor and vendee; and therefore goods in his hands may be stopped as *in transitu* on the insolvency of the vendee (*s*).

Delivery of goods on board a ship *wholly chartered by the consignee*, is not such a delivery to the vendee as to put an end to the *transitus*: thus—

Where one Crane a merchant in London, entered into an agreement with Usherwood, the master of a ship (*t*), for that ship going to Petersburgh, and there receiving from Crane's factor a quantity of merchandize of various descriptions, and proceeding from thence to London, in consideration of certain freight to be paid *per* ton, half on the unloading, and the remainder in three months; for which goods the master was to sign the usual bills of lading, and Crane was fully to load the ship. In consequence of this agreement the ship sailed to Petersburgh, and was loaded by Bohtlingk and Co. on account and risk of Crane; and one bill of lading directing the goods to be delivered to Crane or his assigns, was sent to him; the other in consequence of the plaintiff, Bohtlingk, having information of Crane's insolvency, was afterwards sent to Schneider, his agent, with directions

(*r*) Smith *v.* Goss, 1 Campb. N. P. C. 282.—and see the opinion of Mr. J. Buller in Ellis *v.* Hunt, 3 T. R. 469.—and Hodgson & Loy, 7 T. R. 440.

(*s*) Hunt and others *v.* Ward cited in 3 T. R. 467.

(*t*) Bohtlingk *v.* Inglis, 3 East. 380.—and see Inglis *v.* Usherwood, 1 East 515.

not to deliver that part to Crane, unless he gave sufficient security for the amount of the goods. And the plaintiffs at the same time that they sent this part of the bill of lading to Schneider, informed Crane of their having done so, and required him, in case he did not give the security, to deliver to Schneider the bill of lading that had been sent to him, Crane.

In fact, Crane had become a bankrupt before the goods were delivered on board the ship in Russia, but after their purchase; and on the arrival of the ship in the Thames, Schneider demanded the goods of the master, who refused to deliver them up to him, but delivered them to the defendants, who were Crane's assignees.

The question was, whether the possession of Usherwood, the master, be any thing more than the possession of a carrier, and not the actual possession of the bankrupt? And it was decided, that the delivery of the goods on board such chartered ship does not preclude the consignor to stop the goods in their transit, on board such ship, to the vendee, in case of his insolvency before actual delivery, any more than if they had been delivered on board a general ship. In both cases the possession of the master is the possession of a carrier.

A ship on board of which goods are loaded must have completed her voyage before the *transitus* can be considered at an end, so as to defeat the right of the consignor to stop *in transitu*: and therefore where a ship (*u*), which ought to have performed quarantine, came into port without having done so, upon which the assignees of the consignee, who had become a bankrupt, went on board and claimed the cargo as belonging to the

(*u*) Holst *v.* Pownal, 1 Esp. N. P. C. 240.
Acc. Abbott, p. 3. c. 9. s. 13.

bankrupt's

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bankrupt's estate, and opened some of the packages, and put persons on board to keep possession, and afterwards the ship was ordered out of port to perform quarantine: and whilst the ship was performing quarantine the agent of the consignor claimed the goods, on behalf of his principal, and offered the master of the ship an indemnity against adverse claims; which claim and offer were repeated after the quarantine was ended, and the ship in port. Notwithstanding which the master delivered the cargo to the assignees of the consignee. In an action of trover for the cargo brought by the consignor against the assignees of the consignee, it was held by Lord Kenyon, that the act of the consignor's agent was a stopping *in transitu* sufficient to maintain the action; and that in order to give the assignees a right to claim by virtue of possession, such possession should have been obtained *on the completion of the voyage:* that in the present case the voyage was not completed till the ship had performed quarantine, till which time she was *in transitu;* and that as the plaintiff's agent had given notice and claimed the cargo, before the completion of the voyage, it was stopped time enough to prevent the property from vesting in the assignees. The plaintiff therefore had a verdict, and a new trial being afterwards moved for, the court concurred in opinion with the Chief Justice.

By statute 26 G. III. c. 59, § 4. the proprietor, importer, or consignee of wine, is required within twenty days after the ship has been entered at the custom house, to make an entry of the wine, pay the duties, and land it; upon failure the wine is to be conveyed to the King's warehouse, and if the duties are not paid within three months, it is to be publicly sold, to defray the duties and expenses, and the surplus, (if any,) to be paid to the proprietor,

prietor, or other person authorized to receive the same. Upon this statute has arisen a question of stoppage *in transitu.* CHAP. IV.

Leyland and Cragg, who carried on business as wine-merchants (*x*) had a quantity of wine consigned to them on their own account; after the ship's arrival, and before the expiration of the twenty days, Leyland and Co. became bankrupts, and the duties not being paid, the wines were removed to the King's warehouse. The day before the expiration of the three months, the agent for the consignors applied and endeavoured to get possession of the wine, but did not succeed; and the wines were afterwards sold by public sale at the King's warehouse.

For the plaintiffs it was contended, that the goods had come to the bankrupt, so that the right to stop *in transitu* was gone. But Lord Kenyon held that the plaintiffs were not entitled to recover, and he observed, that the courts had of late years leaned much in favour of the power of the consignor to stop his goods *in transitu*; it was a leaning in furtherance of justice. Lord Hardwicke had been of opinion, that in order to stop goods *in transitu*, there must be an actual possession of them obtained by the consignor, before they came to the hands of the consignee; but that rule has since been relaxed; and it is now held that an actual possession is not necessary; that a claim is sufficient; and to that rule he subscribed. In the present case the bankrupt had no title to the actual possession till the duties were paid; until then they were *quasi in custodia legis*; before the sale the agent for the consignors claimed and endeavoured to get possession; that was a sufficient stopping *in transitu*, in his opinion, to secure the rights of the consignors.

(*x*) Northey and other assignees *v.* Field, 2 Esp. N. P. C. 613.

It

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It is added to the report, that the plaintiff asked for a case, which was granted; but never afterwards moved. The opinion of Lord Kenyon was recognized by the present learned Chief Justice of the Court of King's Bench, in Nix *v.* Olive, Guildhall Sittings after T. T. 1805—cited in Mr. Abbott's book on Merchant Shipping, p. 378. 3d. Ed. *p. 422, 4th. ed.*

We now come to the second division of our subject—Where the *transitus* shall be considered at an end: This will be seen by the following cases:

Trover for a quantity of files (*y*); the case was, that one Moore ordered the goods in question from the plaintiffs, who were manufacturers at Sheffield, which were accordingly sent by the waggon, directed to Moore in London. The plaintiffs drew a bill upon Moore for part of the price of the goods, which was never paid, and Moore became bankrupt before they arrived in London. Immediately upon their arrival, the files were attached by process of foreign attachment, at the suit of a creditor of Moore; but still remained at the inn charged with such attachment. A provisional assignment of Moore's effects being afterwards made to the messenger under the commission, he demanded the goods of the defendant Hunt, the carrier, and put his mark upon the cask, but did not take away the goods. After which the plaintiffs, hearing of Moore's bankruptcy, wrote a letter to the carrier, directing him, in case the goods were not delivered, to keep them in his warehouse: and subsequently demanded them of the innkeeper, who refused to deliver them; and the attachment being afterwards taken off, the goods were delivered to the defendants, who were the assignees of Moore's estate. The court held, that

(*y*) Ellis *v.* Hunt, 3 T. R. 464.

the

the goods having arrived at their journey's end, and having been taken possession of by the provisional assignee, who was clothed with the rights of the bankrupt, by his putting his mark on them, though the local situation of them was not, nor could it be, changed, on account of the attachment; that the goods were no longer *in transitu*, when the plaintiff gave notice to the carrier.

Where a part of an entire order has come to the actual possession of the vendee, the right to stop *in transitu*, is gone for the whole:—as

Where the plaintiffs at Baltimore (z) shipped seven thousand bushels of wheat, their property, by order and on account of George and Henry Browne, to be paid for at a future day; for which the defendant Heyward, who was the master of the ship on board of which the wheat was loaded, signed five bills of lading for the same, deliverable at Cork, or a market, to Brownes or their assigns. Previous to the arrival of the wheat, the Brownes had sold the wheat to one Scott, and assigned the bill of lading sent to them to Scott or his assigns, who afterwards assigned the same to Fox the other defendant, in order that he might take possession of the wheat on arrival on Scott's account; the ship afterwards arrived, and part of the cargo (eight hundred bushels) was delivered to Fox; after which, before the delivery of the residue, the Brownes having become bankrupts, and not having paid the plaintiff/s for the said wheat, they gave notice to Heyward not to deliver the residue of the said wheat to Fox, but claimed it for themselves; notwithstanding this Heyward did deliver the rest of the wheat to Fox, whereupon the plaintiff brought trover against Heyward and him.

(z) Slubey and another *v.* Heyward and others, 2 H. Bl. 504.

but

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But the court were of opinion that, under the circumstances of this case, the action could not be maintained, for the *transitus* was ended by the delivery of the eight hundred bushels, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of the delivery to separate part of the cargo from the rest.

So (*a*) where a number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, *weighed the whole, and took away several bales*, and then became bankrupt, whereupon the vendor within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. Held that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained, in the hands of the wharfinger.

In this case it was proved to be the custom of the trade, that the charges of warehousing were to be paid *by the vendor* for fourteen days after the sale. But the jury was of opinion that this was a mere indulgence to the vendee. And it was considered to make no difference, for the vendor could not avail himself of any payment he was liable to, to prevent an actual delivery of the goods from operating as such.

We have seen, in the former division of this subject, that where goods are delivered to a packer, or wharfinger, to be forwarded to the consignee, the transit is not at an end by such delivery; even though such packer or wharfinger be named by the consignee; but the law is otherwise when the consignee uses the warehouse of the

(*a*) Hammond and others, *v.* Anderson, 1 Bos. and Pull. N. R. 69.

packer

packer or wharfinger as his own, and has the goods sent there as the place of their ultimate destination; in such case, the vendor's right to stop *in transitu* is as completely divested by the delivery at such warehouse, as if it were, in fact, the warehouse of the consignee: thus:—

Trover for goods (*b*)—The goods in question were purchased of the plaintiffs at Manchester, by one Moisseron (who was the general agent, in London, of the house of Le Grand and Co. of Paris), in the name of that house; by the directions of Moisseron, the goods were sent for him to the house of the defendant in London, who was a packer, and arrived there on the 3rd of September, 1802: upon their arrival there, Moisseron came to the defendant's house and had some of the goods unpacked and sent away, and the remainder repacked; on the 7th of September, while the goods so repacked remained in the house of the defendant, news arrived that the house of Le Grand and Co. had failed; upon which the plaintiffs tendered to the defendant his charges upon the goods, and required that they should be delivered up to him. It appeared that Moisseron had a general power either to send the goods to Le Grand and Co. at Paris, or to Holland, Germany, or such other market as he should think most beneficial. It was held that, as the goods were not sent to the defendant to be delivered by him to the house of Le Grand and Co. but to Moisseron the agent of the house in London, and were there to wait his disposal; the goods were received by the defendant, not on the account of Le Grand and Co. but on that of Moisseron. The delivery to the defendant therefore was clearly a delivery to Moisseron, although the

(*b*) Leeds and another, *v.* Wright, 3 Bos. and Pull. 320.—4 Esp. N. P. C. 243. S. C.

goods

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goods were intended for exportation; and his conduct shows that they were so considered, since, after the arrival at the defendant's house, he ordered some to be unpacked and sent away, and the remainder to be repacked—consequently the goods were no longer *in transitu*.

To the same purpose is the following case:

Trover for goods (*c*): the goods in question had been ordered by one Berkley, who was a merchant in London, of Messrs. Wallers at Manchester, and were forwarded by them, directed to him at the Bull and Mouth Inn, on the 16th of March 1802. On the 23d of March the goods were sent from the Bull and Mouth Inn, to the house of the defendant, who was a packer, not in consequence of any order respecting those particular goods, but in consequence of a general order from Berkley to send all goods directed to him to the defendant's house. On the 11th of March, Berkley, who lived in lodgings, and had no warehouse of his own, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the defendant's house, they were booked for the account of Berkley; and the defendant not knowing that Berkley had then absconded, and not having any directions from him respecting the goods, caused them to be unpacked, with a view to ascertain of what they consisted. On the 31st of March, Messrs. Wallers having learned the situation of Berkley's affairs, claimed the goods from the defendant; and, on the day after, they were demanded by the plaintiffs, who had been appointed assignees under a commission of bankrupt against Berkley. The defendant being indemnified by Messrs. Wallers, refused to deliver the goods to the plaintiffs. It was holden that in this case the *transitus*

(*c*) Scott and others *v.* Pettit, 3 Bos. and Pull. 469.

was

was at an end; there being no other place of delivery than the warehouse of the packer; if the *transitus* did not end there, it never could end; consequently the delivery to the packer was a delivery to the bankrupt himself (*d*).

By the case of Bothlingk *v.* Inglis, before cited, the law is settled, that there is no distinction between goods imported in a general ship, and a ship chartered by the consignee for that particular voyage, as to the consignor's right to stop *in transitu*. But where a ship is hired for a term of years, by persons, who during that time have the entire disposition and controul over such ship, goods delivered for those persons on board, for exportation, cannot be stopped *in transitu*.

This was an action of trover (*e*), brought by the assignees of Hunter and Co. to recover the value of a certain quantity of tobacco shipped by the defendants by the order of the bankrupts, on board the Minerva, bound from London for Naples and Alexandria, which ship was chartered by the bankrupts for three years from July 1792, and which was paid for by a bill at three months, drawn by the defendants on the bankrupts and accepted by them. The goods were shipped on the 4th of February 1793, for which the mate's receipt was given, and an invoice thereof was made out by the defendants in the names of the bankrupts. The vessel was detained by contrary winds at Portsmouth, during which time the bankrupts having stopped payment, about the 11th of March 1793, the defendants procured bills of lading to

(*d*) And see Richardson *v.* Goss, 3 Bos. and Pull. 127. Foveld v. Hughes, 16 East, 308.

(*e*) Fowler and another, assignees of Hunter and Co. *v.* Kymer, cited in 7 T. R. 442, 1 East 522, and 3 East 396, 399.

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be signed by the captain to them, and obtained possession of the tobacco in September 1794, and procured it to be relanded, and afterwards disposed of it for their own benefit. It appeared that the bankrupts during the three years were to find stock and provisions for the ship, and pay the master, and in fact were to have the complete controul over, and disposition of the ship, as their own. The ship had been one voyage to Alexandria under this charterparty, and the goods in question had been bought by the bankrupts, and put on board of her to be sent on a mercantile adventure. Under the circumstances of this case, it was holden that the delivery of the goods on board the ship, was a complete delivery to the bankrupts, and that the goods not being *in transitu* could not be stopped; and consequently the plaintiff recovered.

And it seems, that the general principle established by this case is—that if goods be delivered in this country, on board a ship chartered by the vendee, it is in effect a delivery to the vendee (*f*), To deprive a vendor of his right to stop *in transitu*, it is not necessary that the goods should be delivered at the vendee's place of abode; it is sufficient that they have come into his possession, and that he has exercised acts of ownership over them, though at a place short of their original destination.

The plaintiff (*g*) who was a manufacturer at Norwich, had entered into an agreement with one Shevill for the purchase of four pipes of port wine, Shevill wrote up to his correspondent in London, a person of the name of Farquharson, to send the wine. He purchased it from

(*f*) *Per* Lawrence, J. in Inglis *v.* Usherwood, 1 East 525—and also in Bohtlingk *v.* Inglis, 3 East 399.

(*g*) Wright *v.* Lawes, 4 Esp. N. P. C. 82.

Bamford,

Bamford, Bruin, and Co. and had it shipped; and by the bill of lading, consigned the wine to the plaintiff by a vessel employed in the course of trade between Yarmouth and London. When the wines arrived at Yarmouth, one Broadman, as the agent of the plaintiff, received the wines on his account; but his own cellars not being large enough to hold them, he applied to the defendant, who took them into his cellars, and was to be paid the warehouse-rent by the plaintiff. Two days after the plaintiff being then at Yarmouth, went to the defendant's cellars, where the wines were deposited, and tasted and sampled them. While the wines remained in the defendant's possession, Bamford, Bruin and Co. discovered that Farquharson, to whom they had sold the wines, was a swindler, and a man of no property, they therefore stopped the goods in the defendant's possession, and gave him an indemnity.

In an action for the non-delivery of these wines, Lord Kenyon held—That there was no colour for saying these goods were *in transitu*, the consignee having exercised acts of ownership over the wines by tasting and sampling them, and paying warehouse rent. And although they had not reached the plaintiff's place of abode, where they were to be ultimately delivered, yet there was a complete delivery at Yarmouth, by the delivery to the plaintiff's agent *according to the bill of lading*.

This last case may, upon a cursory view, appear to be at variance with the case of Holst *v.* Pownal (*h*), cited in this section; which determines that the *transitus* in goods continues till they arrive at their ultimate place of destination, and that the consignee's getting possession of them before such arrival shall not divest the right of

(*h*) 1 Esp. N. P. C. 240.

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the consignor to stop *in transitu*; but it may be observed, that both that case and the one last cited arose upon a transit under a bill of lading; by which the captain of the ship undertakes to deliver the goods to the consignee *at a certain place*, and consequently the consignee has no authority to demand them *before* their arrival there. But in the case of carriage by land, where there is no such undertaking, it seems that if the vendee meet the goods upon the road, and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage (*i*). Now here the goods being deliverable, by the bill of lading, at Yarmouth, though an ulterior destination was contemplated by the parties, the vendor's right of stoppage being defeated by the actual possession of the goods taken by Wright at Yarmouth, is perfectly consistent with the principle of the cases cited.

Where goods, which are ordered for the purpose of being sent abroad, have come to the hands of an agent of the vendee, in whose hands they were to remain until the agent received orders as to their ulterior destination; the right to stop *in transitu* is gone when the goods arrive at the hands of such agent.

Trover (*k*) for eighteen bales of cotton twist; it appeared that the goods in question had been furnished by the defendants, cotton dealers at Manchester, to the order of Battier, a trader living in London, whose course of dealing it was to send orders to the defendants for goods of this description to be forwarded to Metcalfe and Co. at Hull, for the purpose of being shipped to the

(*i*) *Per* Lord Alvanley in Mills *v.* Ball, 2 Bos. and Pull. 461.

(*k*) Dixon and others, assignees of Battier *v.* Baldwin and another, 5 East 175.

correspondents

correspondents of Battier at Hamburgh, and by those correspondents sent to the persons for whom the goods were intended. When the goods arrived at Hull, the Metcalfes received orders from Battier when and to whom to ship the goods to Hamburgh. This course of dealing had subsisted between these parties for four years; and as Battier received orders from abroad for cotton twist, he from time to time gave orders to the defendants to send the goods to Metcalfes and Co. at Hull, to be shipped for Hamburgh as usual. Of this import was the order for the goods in question, which was sent by Battier to the defendant in a letter dated the 31st of March 1803, in which the goods were directed to be "packed in bales, marked G. S. (and a certain mark) for "order, and to be forwarded to Messrs. Metcalfe and "Sons, to be shipped for Hamburgh as usual." The goods were accordingly sent by the defendants to the Metcalfes at Hull, marked, and made up in the manner directed. In the beginning of July following Battier stopped payment, of which the defendants being immediately apprized, one of them proceeded to Hull, and stopped the goods in the hands of the Metcalfes on the 7th of July, and some time after in the same month, took possession of them, upon giving the Metcalfes an indemnity. Four of the bales had been actually shipped on board a vessel about to proceed to Hamburgh; but they were afterwards relanded upon the application of the defendants, and were returned to them with the rest which had remained in the warehouse of the Metcalfes from the time of their arrival at Hull. One of the Metcalfes, who was examined as a witness, stated, that at the time of the stoppage of the goods, they held them for Battier, and at his disposal; that they accounted with Battier for the charges of the goods. And the witness described

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described his business to be merely an expeditor, agreeable to the directions of Battier; a stage and mere instrument between the buyer and seller. That he had no authority to sell the goods, and frequently shipped them without seeing them. That the bales in question were to remain in his warehouse for the orders of Battier; and that he had no other authority than to forward them. That at the time the goods were stopped, he was waiting for the orders of Battier; that he had shipped the four bales expecting to receive such orders, and relanded them because none had arrived. That if the goods had been demanded by Battier before shipping, he should have delivered them up to him. The question was, whether the defendants had a right to stop the goods *in transitu*, at the time they took possession of them? And it was held that, the goods in question having got so far to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, without which orders they would continue stationary, the *transitus* was at an end. As between the vendor and vendee the goods had arrived at their ultimate place of destination, and consequently the right of stoppage was gone.

So if goods, after they are sold, remain in the warehouse of the vendor, and he receives warehouse-rent for them, this is as much an executed delivery of the goods to the vendee, as if goods bought of a third person had been delivered at such warehouse, which, in respect of the warehouse-rent, is the warehouse of the vendee; and such delivery puts an end to the vendor's right to stop *in transitu* (*l*).

(*l*) Hurry and others *v.* Mangles and others, 1 Campb. N. P. C. 452.

Following

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Following the plan proposed, for the arrangement of the cases on this subject, we are now to consider—By whom, and under what circumstances, the right of stoppage *in transitu* may be exercised?

From what has already been said of the right of stoppage *in transitu*, it will be seen that, to entitle any one to this right, he must stand in the relation of vendor to the bankrupt: and therefore where a trader here gives an order to his correspondent abroad for goods, which the latter procures upon his own credit, though he charge no advance upon the invoice-price, but merely takes a commission, he is to be considered as the vendor for the purpose of stopping the goods *in transitu* upon the insolvency of the trader here; thus:—

Where it appeared (*m*) that in June 1801, an order was given by Browne, the bankrupt, to Fritzing, his correspondent abroad, to purchase a quantity of wax for him. Fritzing bought it accordingly of another merchant, who was a stranger to Browne, and had no account or correspondence with him, nor was there any privity between ~~Browne and the merchant of whom the wax was purchased.~~ them On the 2nd of August, the wax was shipped, and on the 4th, Fritzing drew bills of exchange on Browne for the invoice price of the wax, including his commission, *payable to his own order*, which Browne accepted; on the 10th of August, Browne received the invoice and bill of lading; and on the 2nd of September, (not having paid the bills) he became a bankrupt: on the next day, the defendant, on behalf of Fritzing (being his agent under a general power of attorney) obtained from the bankrupt's brother the bill of lading and invoice, and afterwards obtained possession

(*m*) Feise and another, assignees of Browne *v.* Wray, 3 East 93.

of

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of and sold the wax. In an action of trover for the wax, brought by the assignees of Browne, It was holden that Fritzing was to be looked upon as the vendor of the goods—For the name of the original owner was never made known to the bankrupt; there was no privity between them; but the goods were sold and the bills drawn in Fritzing's own name; he therefore had a right to stop the goods *in transitu* on the insolvency of Browne.

So also a person who consigns goods on the joint account of himself and the consignee, may stop such goods *in transitu* upon the failure of the latter.

Trover for certain barrels of beef and certain other barrels of pork (*n*). The pork * in question was shipped on board the Russel in May 1803, and consigned by the plaintiffs, who were Irish provision merchants residing at Cork, to Church, a merchant in London, *on the joint account of themselves and Church*. The bill of lading signed by the captain was dated "Cork 20th of May 1803," to deliver "to Matthew Church or his assigns." The plaintiffs at the same time drew a bill on Church for half the amount of the shipment; but it was never paid, or even presented, in consequence of the subsequent bankruptcy of Church. The bill of lading as soon as received by Church was, without the privity of the plaintiffs, by him indorsed and delivered to the defendants, upon condition of their making an advance to him upon it, which they failed to do, but claimed to retain it as a security for prior advances made to him. The question was if under these circumstances the plaintiffs had a

(*n*) Newsom and another *v.* Thorton and another, 6 East 17.

* The case, as far as respects the beef, was decided upon another point.

right

right to stop the pork *in transitu*, Church having become a bankrupt. And it was held that he had—For though Church as a *joint owner* had a right to pledge the bill of lading, yet having agreed to pledge it to the defendants on a condition which had not been performed, there was no consideration paid by them for the bill of lading, and consequently there was nothing to divest the original right subsisting in the consignors to stop the goods *in transitu*, upon the insolvency of the consignee.

But a mere surety, upon whose credit, and through whose intervention, goods are purchased of a merchant abroad, is not such a vendor *quoad* the consignee as to exercise the right of stopping *in transitu*; as the following case will shew.

Trover for a quantity of wheat (*o*). The case was shortly this:—Browne, a merchant in London, in July, 1801, gave an order to Dubois and Co. of Dantzic to ship for him the wheat in question, and to draw for the amount on one Fritzing of Hamburgh, (who had agreed to accept the bills in consideration of a commission on the amount); and to forward the shipping documents to him, through Fritzing. The wheat was accordingly shipped, and on the 18th of August, Dubois and Co. drew for the amount on Fritzing, who accepted the bills, and on the same day Dubois and Co. transmitted two bills of lading, (one of which was made deliverable to Dubois and Co. or order, and the other unto order or assigns) indorsed in blank, both of which Fritzing, on the 28th of August, 1810 forwarded to Browne without indorsing them. Before the arrival of the bills of lading or the wheat, Browne became bankrupt. Fritzing having also stopped

(*o*) Siffken and another, assignee of Browne *v.* Wray, 6 East 371.

payment

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payment, the bills drawn upon him were dishonoured. In this state of things the goods arrived, and by the consent of Browne were taken possession of by the defendant, (who was the general agent, in London, of Fritzing,) for the purpose of applying the net-proceeds in discharge of the bills drawn on account of the shipment.—This arrangement was subsequently approved of by Dubois and Co. in a letter to the defendant. The assignees of Browne, however, demanded the wheat of the defendant, who claimed to retain it as legally stopped *in transitu*. The question for the opinion of the court was, Whether they were entitled to recover? And it was held, that Fritzing had no right to stop the goods *in transitu*, he being a mere surety for the payment, and the relation of vendor and vendee not subsisting between him and Browne. Neither could the defendant retain the goods on the account of Dubois and Co, he being no agent of theirs, and not having any authority from them *at the time* of such stoppage *in transitu;* and the subsequent ratification of the defendant's act could not make it a stoppage *in transitu* on their account by relation.

Where a bill of lading is indorsed to an agent, without consideration, merely for the purpose of enabling him to stop goods *in transitu* for his principal, although, if he be fortunate enough to get possession first, he may retain the goods against the consignee, yet it seems he can maintain no action for them *in his own name*, for such indorsement without consideration transfers no property; he must therefore sue in the name of his principal (*p*).

But though it is a general rule, that the consignor is entitled to reclaim goods at any time during their transit to the hands of an insolvent consignee, yet that right may be restrained or defeated by the peculiar circum-

(*p*) Waring *v.* Cox, 1 Campbell, N. P. C. 369.

J. C. Abbott, 227. In Cox v. Harden, 4 East, 211, a doubt had been expressed whether such agent could maintain trover before the receipt of the goods;

stances

stances under which the consignment is made; as where goods are consigned in pursuance of an agreement between the consignor and third persons, to be applied in the execution of certain trusts; in such case the consignor cannot countermand the delivery on the failure of the consignee in trust, whilst such trusts remain unsatisfied; as has been decided in the following case.

Messrs. Smiths and Atkinson (*q*) were merchants and bankers, residing in London, and carrying on business under two different firms, namely, the banking business under the firm of Samuel Smith, Sons, and Co, and the business of merchants under the firm of Smiths and Atkinson. George and Henry Brown, merchants in Liverpool, kept an account with Samuel Smith, Sons, and Co. as their bankers: and in January, 1793, wishing to increase their drafts to a much greater amount than had been at first intended, entered into an agreement with them to the following effect; that the Browns should be at liberty to draw five thousand pounds *per* week from the 1st of February to the 12th of March upon Samuel Smith, Sons and Co, remitting them good bills of exchange on London to cover the amount; *and that as a collateral security, they should consign to the house of Smiths and Atkinson, hemp and iron to the amount of ten thousand pounds on sale for their account.* This agreement was entered into for the accommodation of the Browns, and entirely at their request. In consequence of this agreement, the Browns did draw upon Samuel Smith, Sons and Co. to a considerable amount; and in pursuance of the agreement, on the 13th of February 1793, remitted to Smiths and Atkinson the invoice and bill of lading, in-

(*q*) Haille *v.* Smith and another, in Error, in Cam. Scacc. 1 Bos. and Pull. 563.

dorsed

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dorsed in blank, of a quantity of iron and hemp, by the ship Hawke, of which the plaintiff in Error (Haille) was captain. In the correspondence which took place between Smiths and Atkinson and the Browns, subsequent to this consignment, the former applied to the latter for directions respecting the disposal of the goods, and the prices they might be willing to take. An insurance was effected in the names of Smiths and Atkinson, who were to receive the usual commission on the sale. At the time when the invoice and bill of lading were remitted, the Hawke was in the port of Liverpool, and ready to sail for London, but was prevented from sailing by an embargo. The Browns, being at that time considerably in arrear to Samuel Smith, Sons and Co, on the 5th of April 1793 were declared bankrupts; in consequence of which, Smiths and Atkinson having demanded the goods in question of the captain of the Hawke, which was still lying in the port of Liverpool, and tendered the charges, the latter refused to deliver them, alleging that he had orders to that effect from the assignees of the Browns, to whom he afterwards delivered them. Upon these facts being proved at the trial, Mr. Justice Lawrence, before whom the cause was tried, directed the jury that the consignment to Smiths and Atkinson was not a consignment to them as factors or agents only of the Browns acting merely for the benefit of their principals, but was a consignment to them, not only to sell the goods under the direction of the Browns, but also by the produce thereof to protect and indemnify the banking-house of Samuel Smith, Sons and Co. against their advances and acceptances on account of the Browns; and that the law as between principal and factor, did not apply in this case, and therefore, that the captain's refusal to deliver was evidence of a wrongful conversion, and the plaintiffs below

below were entitled to recover in trover. To this direction a bill of exceptions was tendered.

After two arguments, the court of error decided, that the moment the goods were put on board the Hawke, and the bill of lading indorsed, and remitted to Smiths and Atkinson, the property was changed, and was to remain in their hands cloathed with the trust, expressed in the agreement, and therefore affirmed ~~in~~ the judgment below.

If however, the property of goods be once vested in the consignee by a consignment on his account and risk, to be paid for at the expiration of a limited credit, or by bills at a given date, it is not competent to the consignor to repossess himself of the goods during their transit, upon the refusal of the consignee to pay ready money for them, he remaining solvent.

In trover for a quantity of timber, (*r*) it appeared in evidence, that the plaintiff, a merchant at Liverpool, gave an order for the timber to Schumann and Co, ~~mer~~ merchants residing at Memel; in pursuance of which Schumann and Co. informed the plaintiff by letter of the 1st of May, 1802, that they chartered on his account the ship Esther, Captain Rose of Liverpool; and on the 15th of May they wrote him another letter, inclosing him the bill of lading and invoice of the timber, and saying, that they had sent the charter-party in a letter which Captain Rose would deliver; and advising the plaintiff further that they had drawn on him certain bills at three months for the value of the timber. The invoice expressed the timber to be shipped *on the account and risk of Walley*, (the plff) and the bill of lading was unto order or assigns, *he or they paying freight according to charter-party,*

(*r*) Walley *v.* Montgomery, 3 East 584.

and

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and indorsed in blank by Schumann and Co.—Schumann and Co. sent another bill of lading of the timber to the defendant, their agent, by virtue of which he got possession of the cargo before the plaintiff had demanded it: but on the 21st of June, two days after the arrival of the timber, finding that the defendant had obtained possession of it, he applied to him, offering to accept the bills drawn on him by Schumann and Co. and demanding the timber, which the defendant refused, unless the plaintiff would pay for it immediately. This the plaintiff refused to do, in consequence of which, the defendant retained possession, and afterwards sold the cargo under the authority of Schumann and Co. The plaintiff then demanded the cargo of the captain, and brought this action: but there was no proof of any tender of the freight, for want of which the plaintiff was nonsuited. Upon a motion to set aside this nonsuit, and for a new trial,—It was resolved, that it appearing by the invoice, that the goods were shipped *for account and at the risk of the plaintiff*, the property of the cargo was vested in him by the bill of lading and invoice, and by the delivery of the goods to the captain, subject only to the right of stoppage *in transitu*, which could not be exercised in this case, the plaintiff being ready to accept the bills. And that as to the payment of freight, that was a question between the captain and the plaintiff, with which the defendant had no right to concern himself. The nonsuit was therefore set aside, and a new trial granted.

It has been seen that the right of stoppage *in transitu* can only be exercised where the relation of vendor and vendee subsists between the consignor and consignee; and therefore a person who has a mere lien upon goods without any property in them, cannot after having parted with the actual possession, repossess himself of such goods while *in transitu*: upon this principle, where

One

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One Gard (*s*) a clothier in London, before his bankruptcy employed the defendant, a fuller in Exeter, in his business; at the time of the transaction aftermentioned the bankrupt was indebted to the defendant upon the general balance of accounts in more money than the value of the goods in question; and by the custom of the trade at Exeter, the defendant had a lien for his general balance. The cloths for which the action was brought had been sent by Gard before his bankruptcy to the defendant to be fulled as usual; and after they were finished, the defendant, in consequence of prior orders from Gard, shipped them on board a certain vessel at Exeter, to be forwarded to him in London, and sent the invoice to Gard. No bill of lading was signed by the captain at the time of the shipment, but soon after the vessel sailed, Pym, hearing of Gard's bankruptcy, followed and overtook the captain off Deal in his passage to London, and there procured him to sign a bill of lading to himself or order, by virtue of which, Pym obtained the delivery of the goods on their arrival in London. It was held, that the right of lien only continues while the goods are in the possession of the party claiming it; and that here the goods being shipped by the order and on the account of the bankrupt, who was to pay the freight, the custody was changed by the delivery to the captain; and that therefore, Pym having once parted with the possession of the goods, could not stop them *in transitu*, and thereby revive this lien.

Where the consignor of goods has a right to stop *in transitu*, such right is not affected by the circumstance of a partial payment, or the consignee having accepted bills drawn upon him on account of such goods, though

(*s*) Sweet and another, assignees of Gard *v.* Pym, 1 East. 4.

such

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such bills are not due:—thus in the case of Hodgson and others, assignees of Ward a bankrupt *v.* Loy (*t*), which was an action of trover to recover a quantity of butter. The plaintiffs claimed as assignees under a commission of bankrupt against Ward, dated the 25th of March, 1797. In the beginning of February, prior to his bankruptcy, the bankrupt, who was a butter merchant, residing in Cumberland, purchased sixty firkins of butter of one Cowper at forty one shillings *per* firkin, and paid one halfpenny earnest. It was originally agreed that Ward was to pay forty pounds of the purchase money in cash upon the Tuesday se'nnight following the contract, on which day the butter was to be delivered; the forty pounds was not paid on the day specified, but on that day Ward purchased of Cowper forty four and a half other firkins of butter, making in all one hundred and four and a half, and Cowper being indebted to Ward in the sum of twenty pounds, Ward in addition to that sum paid him thirty pounds more on account of the butter, and promised to send him a bill for one hundred pounds, which he afterwards did; but that bill when it became due, was not paid.—Upon the bankruptcy of Ward the goods were stopped *in transitu*, by the vendor; and it then became a question, whether the circumstances of part payment by the vendor, took the case out of the general rule.—Lord Kenyon was of opinion, that it did not; but the other judges expressing a wish to have an opportunity of examining the cases upon that point, the case stood over; and afterwards Lord Kenyon delivered the opinion of the court in substance as follows. We have looked into the cases cited, and as it is a case of great consequence to the commercial world, and as it is

(*t*) 7 T. R. 440.

of

of vast importance that questions that have been long settled should not be set afloat again on account of some trivial circumstances that formed no ingredient in some of the decisions in which the general doctrine was established, and as we have no doubt ourselves on the subject, we think that the case should not be argued again. When the distinction was first taken at the bar, I thought it not well founded; and on looking into the cases that were referred to in support of it, we are clearly of opinion, that the circumstance of the vendee having partly paid for the goods does not defeat the vendor's right to stop them *in transitu*, the vendee having become a bankrupt; and that the vendor has a right to retake them unless the whole price has been paid. And indeed the Lords Commissioners seem to have been of the same opinion in the case of Wiseman *v.* Vandeput; (2 Vern. 203) for they "decreed an account, that if any thing were "due from the Italians (the consignors) to the Bonnells, "(the consignees) that should be paid to the plaintiffs, "but they should not have the value of the silks by vir-"tue of the consignment." Therefore we would not have it supposed that there is any doubt on the question. The consequence is, that the postea must be delivered to the defendant.

So in the case of Feize *v.* Wray (*u*), stated in a former part of this section, though the consignee before his bankruptcy, had accepted bills drawn on him by his correspondent for the amount of the goods; which bills it was contended might be proved under the commission against the consignee; it was held that such bills were at most but a partial payment, And therefore did not take away the vendor's right to stop the goods.

(*u*) 3 East, 93.

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Nor is this right of the consignor affected by a usage for carriers to retain goods upon which they claim a lien for a general balance of account between them and the consignees, even if such a lien could be supported; thus:

In trover for goods (*x*). It appeared that the defendant was a common carrier from London to Exeter and Plymouth, and as such received the goods in question from the plaintiffs, by whom they were consigned to the house of Negretti and Co. at Plymouth; that Negretti and Co, when they ordered the goods to be sent, gave no directions respecting any particular carrier, and that there was another carrier from London to Plymouth besides the defendant; that previous to the arrival of the goods at Plymouth, Negretti and Co had failed, and a notice had been given to the defendant by the plaintiffs not to deliver them to Negretti and Co, the plaintiffs at the same time tendering the defendant his charge of one pound seven shillings and two pence for the carriage of the goods, and offering to indemnify him; that the carriage of the goods was to have been paid by Negretti and Co. if the goods had been delivered to them; and that the sum of four pounds seven shillings was due from Negretti and Co. to the defendants for the carriage of other goods; that the defendant offered to deliver the goods to the plaintiffs on their paying him the two sums of four pounds seven shillings, and one pound seven shillings and two pence, and indemnifying him; that the defendant previous to this transaction had given notice, by circulating hand bills, and advertisements in the London Gazette and other newspapers, that all goods which should be delivered for the purpose of being carried, would be considered as general liens, and subject not

(*x*) Oppenheim and another *v.* Russel, 3 Bos. and Pull, 42.

only

only to the money due for the carriage of such particular goods, but also to the general balance due from the respective owners to the proprietor of the waggon, and that one of the above mentioned hand-bills had been delivered to Negretti and Co. The defendant then offered evidence of the usage of carriers to retain for a general balance. But Lord Alvanley, who tried this cause, rejected the evidence, being of opinion that is was not admissable, and that the consignor's right to stop *in transitu* could not be effected by such a usage if established. A verdict was therefore found for the plaintiffs with liberty to the defendant to apply to the court for a new trial. CHAP. IV.

A rule *Nisi* for that purpose was obtained; but the court agreed with the Chief Justice, and observed that, this lien at the most, could only amount to a special agreement between the carrier and consignee, and could not possibly interfere with the legal right allowed to the consignor of stopping *in transitu*. And they therefore discharged the rule.

Neither is such right to stop *in transitu* defeated by the goods being attached by process of foreign attachment from the Mayor's court in London, at the suit of a creditor of the consignee, who can obtain no greater right over the goods than the consignee himself. The vendor's power of intercepting the goods is the elder and preferable lien, and is not superseded by the attachment, any more than by the general right of a common carrier to retain all his customer's goods for his general balance, which has been decided against the carrier (*y*).

It ought to be observed, that stopping *in transitu* is

(*y*) *Per* Lord Ellenborough in Smith *v.* Goss, 1 Campbell, N. P. C. 284.—And see Ellis *v.* Hunt, 3 T. R. 464.

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an adverse act: and therefore if it be not done *eo intuitu*, it shall not divest the property of the consignee: as if goods are returned to the vendor by agreement between him and the vendee. Thus in the case of Siffken and another, assignees of Browne *v.* Wray (*z*), fully stated in a former part of this section, where the agent of the consignees had obtained the bill of lading from the bankrupt after his bankruptcy, upon an agreement when the goods arrived to dispose of them, and to apply the net proceeds in the discharge of such bills as had been drawn against the goods, It was held that he could not retain the goods so obtained, by agreement with the vendee after his bankruptcy, against the assignees, there being no adverse stopping *in transitu*.

But in the case of Mills *v.* Ball (*a*), before mentioned, where the consignee of goods being insolvent, and having committed an act of bankruptcy wrote to the consignor to inform him of his circumstances, and to say that he would not receive the goods: in consequence of which information, the consignor obtained possession of the goods whilst *in transitu*,—It was doubted whether the defendant could avail himself of a possession obtained by means of this honest communication of the bankrupt, in an action by the assignees. Mr. Justice Heath said,—"In "this case doubts have arisen with some of the court "respecting the effect of the letter of the 16th of Sep- "tember (containing the information of the consignee's "insolvency.) It appears to me, however, that it will "not vary the plaintiffs' right. In Berwick *v.* Atkyn, "1 Stra. 165 (*b*), the refusal by the bankrupt to receive "the property seems to have been considered meritori-

(*z*) 6 East, 371.
(*a*) 2 Bos. and Pull. 457.
(*b*) And see Cowp. 125.

ous.

" ous. So I think that the conduct of the bankrupts in " this case was commendable." ROOKE, J. " The claim " (of the consignor) was made in consequence of in- " formation (which appears to me to have been very " proper,) that circumstances had arisen in the affairs of " the consignees which made it improper for them to " receive the goods. *In what manner that information* " *was obtained can make no difference in the case.* The " honesty of the consignees ought not to prejudice the " plaintiff's right. If indeed the consignees after getting " the goods into their hands had given them up, the " case would have been very different: but here the in- " formation was given while the goods were *in transitu.*" And CHAMBRE, J. observed that " the vendor did not get " possession of these goods by his own diligence and " care, or in consequence of casual information, but " though the intervention of the bankrupt himself, eight " days after the act of bankruptcy committed. That " circumstance raised some doubt in my mind; since it " appeared that the bankrupt had thereby given a pre- " ference to the plaintiff over the rest of his creditors. " But still upon the whole I am inclined to agree with the " rest of the court. I am not fond of multiplying small dis- " tinctions, and think that too many have already been " taken: and the general inconvenience will not be great, " since many cases of this kind are not likely to arise. " It seems indeed, that there will be a certain degree of " discretion vested in the bankrupt, since he will be " empowered to accept goods which are coming to him " from one consignor, and to give notice to another con- " signor to stop them *in transitu.* *But as no fraud ap-* " *pears* to have been committed on the part of the plain- " tiffs in this case, I am inclined, though not without " some doubt, to concur with the rest of the court."

It

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It must be admitted that the authority of this case, which seems not to have been decided without great doubt, is considerably shaken by the preceding case of Siffken *v.* Wray; the distinction between them is very fine spun. I apprehend it lies here,—That in Siffken *v.* Wray the possession of the consignor was obtained *by the act of the bankrupt*, who delivered up the bill of lading, without which (for the agent had no duplicate) the goods could not have been stopped: whereas in the last case the the stoppage was only effected *through the means of the bankrupt*, by his giving notice.

In drawing this distinction I must own I feel pressed by the case of Feise *v.* Wray (*c*), (which we have had occasion to notice before in this section). In that case the possession of the goods was obtained by the general agent of the consignor obtaining the bill of lading from a servant of the bankrupt, after the bankruptcy. Upon that part of the case, Mr. Justice Grose observed, that "the defendant acting under an authority from "Fritzing (the consignor) applied upon the bankruptcy "of Browne (the consignee) for the purpose of getting security for the goods, and received the bill of "lading from the bankrupt's brother, as he honestly "might, and which the other acted honestly in giving up to "him. This is agreeable to what Lord Hardwicke said "in Snee *v.* Prescot (*d*), that if the consignor get the "goods back again by any means short of felony, he "should not blame him."—It should be recollected that the point here noticed was not the principal point made, nor was it much pressed: and also, that it was decided *before* the case of Siffken *v.* Wray. As to the expression used by Lord Hardwicke in Snee *v.* Prescot, that, I conceive, must

(*c*) 3 East, 93. (*d*) 1 Atk. 250. And see D'Aguila v. Lambert, Ambler, 399.

must be understood with reference to the particular case in which it was used. In that case the goods were seized by the consignor *adversely* to the vendee; and not, as in this case, actually *returned* by the consignee. CHAP. IV.

But where goods have been seized by the vendors under a claim of a right to stop them *in transitu*, though in point of fact the *transitus* was then at an end, it is competent to an insolvent vendee, who has not committed any act of bankruptcy, to give up such goods to the vendors, provided they are so given up *bonâ fide*, and not from motives of voluntary and undue preference; thus:

Where (*e*) Battier and Son traders in London had ordered a quantity of cotton twist of Baldwin and Co. cotton dealers at Manchester, to be forwarded to Metcalfe and Co at Hull, there to wait the order of Battier and Son, which goods were accordingly sent, and shortly after the Battiers stopped payment, of which Baldwin and Co being apprised, one of them proceeded to Hull, and stopped the goods in the hands of Metcalfe and Co. and afterwards got possession of them. At the time when the defendant gave notice to the Metcalfes to stop the goods, they also applied to the Battiers to order them to be delivered up. The Battiers in the mean time called a meeting of their creditors in London, and the case was laid before counsel, concerning their right to ~~restore~~ have the goods ~~to the defendant~~ restored to the defendants'; the result of which meeting and opinion was stated in a letter of the 29th of July from the Battiers to the defendants, in which they informed them, that "yesterday a meeting was held "of their several creditors resident in London, when "they unanimously resolved, that it would be most for

(*e*) Dixon and others, assignees of Battier and Son *v.* Baldwin, 5 East. 175.

"the

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" the interest of the concerned, that the affairs should " be put in trust, and that the property should be di- " vided from time to time amongst the creditors. That the " opinion obtained from counsel, and which they were " happy to say agreed with their own wishes, was like- " wise submitted to their consideration; and it appeared " generally the opinion, that the twist in Hull should be " given up." There was also another letter of the 7th of September from the Battiers to the defendant, inclosing a statement of their affairs; in which they observed that the defendant's " claim is stated according to what " they conceive it to be, after deduction of the goods " stopped at Hull." The Battiers committed no act of bankruptcy till the 26th of September 1803, on which act of bankruptcy a commission issued on the 1st of October. The assignees afterwards demanded the goods; which the defendant refused to deliver up. Upon the question, whether the Battiers were in a condition to rescind the contract; and if so whether they had done any act amounting to a rescinding before their bankruptcy? It was held that the bankrupts were competent to rescind, and had in fact rescinded, the contract for the sale of these goods. That the circumstances of deliberation, advice of counsel, and other circumstances of the case, having been left to the jury as evidence that the transaction was *bonâ fide*, and not from motives of undue preference, and the jury having found that the bankrupts had acted *bonâ fide*, notwithstanding the Battiers must have considered themselves in a state of insolvency and impending bankruptcy, yet as they had in fact committed no act of bankruptcy, the *jus disponendi* over the goods remained by law in them; and having rescinded this contract, in the *bonâ fide* exercise of that right, the defendant was entitled to retain the verdict found for him.

Mr.

Mr. JUSTICE LAWRENCE differed from the rest of the court on this point. He considered that the letter of the 29th of July, was no recognition on the part of the bankrupts of the act of the defendant in stopping the goods, nor an agreement to rescind the contract.—That on the contrary, it imported that they did not choose to do any thing without the approbation of the creditors at large. And there was no assent of the creditors to the stoppage by the defendant.

It remains now to be shewn, according to our proposed division of this subject: In what cases the right of stoppage *in transitu* may be defeated. In the pursuit of this inquiry we shall have occasion to consider the nature and effect of an assignment of a bill of lading by a consignee.

The nature of the bill of lading has been already shewn, but as in the cases which will be cited hereafter, questions have arisen upon the form of the bills of lading, it will be proper here to advert to the different forms in common use.—Sometimes it is made for delivery to the consignor by name, or assigns; sometimes to order or assigns, not naming any person; and at other times to the consignee by name, or assigns. In the two first cases the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person; or indorses it specially for delivery to a person named in the indorsement. It will be perceived that there is a great similarity between this instrument and a promissory note (*f*). The mere possession of a promissory note made payable to another person, and not indorsed by him, gives the holder no power to indorse the note over. Nor ought the mere

(*f*) Abbott on Merchant Shipping p. 3. c. 9. § 16.

possession

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possession of a bill of lading, made for delivery to the consignor and not indorsed by him, to induce any one to believe that the holder is authorized to dispose of the goods. On the other hand, if the bill of lading be originally made for delivery to the consignee; or being made for delivery to the consignor or assigns, or to order or assigns, be indorsed by the consignor, either to a person by name, or generally without designating any person; in these cases the consignee named in the bill of lading, and holding the bill of lading indorsed in blank, may, generally speaking, transfer his property to a third person. But to this rule there are exceptions, depending upon the situation and character in which such consignee or holder possesses the bill of lading, as will be pointed out hereafter.

Nothing is more common than for a person who has received a bill of lading to sell the goods before their arrival, and deliver over the bill of lading to the vendee; a practice which commerce has given rise to amongst merchants; but it is not every mercantile practice of frequent use, and even of general convenience, that is or ought to become, in all its consequences, a part of the law of the land; for if such a rule were adopted, the law must in many cases dissent from its own principles, and vary with the varying fashions of the times; nevertheless the law does adopt into its own bosom many of the ancient customs and usages of merchants, and stretch forth its arm to assert and maintain them, where they are found consonant to legal reason and legal evidence, and most especially when they are calculated to promote honesty, and prevent fraud (*g*).

(*g*) Abbott, Merch. Shipp. p. 3. c. 9. § 16. p. 367.

This

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This practice of the consignee assigning bills of lading has given rise to a very important question, how far the right of the consignor is affected by such assignment, made *bonâ fide* for a valuable consideration; which question will depend (as is observed by Mr. Abbott) upon the extent of legal right which the act of the consignee confers on his assignee. The principle that the consignee of a bill of lading might assign it, was first laid down in the case of Evans *v.* Marttell (*h*); and in the report in Lord Raymond, Shower is reported to have said "that "it had been adjudged so in the Exchequer." And this principle seems to have been acquiesced in, in the case Appleby *v.* Pollock (*i*), where it appeared that one Brand shipped certain goods at Leith, and consigned them to one Stratton in London. Stratton as soon as he received the bill of lading, by indorsement thereon assigned the goods to the plaintiff for one hundred and sixty pounds, and soon afterwards became a bankrupt. Brand hearing of the bankruptcy took process out of some court in Scotland to attach the goods in the hands of Pollock the master of the ship: but the ship having left Leith the process was executed at sea. Upon the arrival of the ship at London, the master refused to deliver the goods to the plaintiff (Appleby,) unless he would indemnify him against the process in Scotland. And thereupon Appleby brought an action against Pollock (the master) to recover the value of the goods. At the trial of the cause before Lee, Chief Justice, at Guildhall, he declared himself of opinion that the assignment gave the plaintiff a sufficient property to maintain the action, if under the circumstances he was entitled so to do. As to the effect

(*h*) 1 Lord Raym. 271, 12 Mod. 256, and 3 Salk. 290. S. C.

(*i*) Cited from MSS notes.—Abbot 368.

of

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of the attachment, parol evidence was given, that by the law of Scotland if goods are arrested the holder must give security not to part with them, and the defendant relied on the process, by which these goods were attached: to which the Chief Justice said, "if the process "could have attached these goods, it could only have "done so within the jurisdiction of the court, and it does "not appear that the place where the goods were at- "tached, was within the jurisdiction of the court; and "it lay upon the defendant to make that out." And the Chief Justice therefore directed the jury to find a verdict for the plaintiff. In the case of Caldwell *v.* Ball (*k*) it is said, that a bill of lading is assignable in its nature; and by indorsement the property is vested in the assignee—in this latter case however, the effect of the assignment, as to the consignor's right to stop *in transitu*, was not decided; but the law is now settled, that an assignment of a bill of lading by the consignee, for a valuable consideration, where the transaction is *bonâ fide*, and the assignee has no notice that the goods are not paid for, is a complete transfer of the property, and divests the right of the consignor to stop the goods *in transitu*: this will be seen by the following case:

Trover for a cargo of corn (*l*)—The plaintiff gave in evidence that Turing and Son, merchants at Middleburgh, in the province of Zealand, on the 22d of July 1786, shipped the goods in question on board the Endeavour for Liverpool, by the order and directions and on the account of Freeman of Rotterdam. That Holmes, as master of the ship, signed four several bills of lading for the goods in the usual forms *unto order or to*

(*k*) 1 T. R. 216. Mason and others, 2 T. R. 63.
(*l*) Lickbarrow and another *v.*

assigns;

assigns; two of which were indorsed by Turing and son *in blank*, and sent on the 22d of July 1786 by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing and Son, and the remaining one was kept by Holmes. On the 25th of July 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to four hundred and seventy-seven pounds in respect of the price of the goods, which was afterwards accepted by Freeman. On the 25th of July 1786, Freeman sent to the plaintiffs the two bills of lading, together with the invoice which he had received from Turing and son, in the same state in which he received them, in order that the goods might be taken possession of and sold by them on Freeman's account; and on the same day Freeman drew three sets of bills of exchange to the amount of five hundred and twenty pounds on the plaintiffs, who accepted and afterwards duly paid them. The plaintiffs were creditors of Freeman to the amount of five hundred and forty-two pounds. On the 15th of August 1786, and before the four bills of exchange drawn by Turing and Son on Freeman became due, Freeman became a bankrupt: those bills were regularly protested, and Turing and Son were afterwards obliged as drawers to pay them. The price of the goods so shipped by Turing and Son was wholly unpaid. Turing and Son hearing of Freeman's bankruptcy on the 21st of August 1786, indorsed the bill of lading so retained by them to the defendants, and transmitted it to them with an invoice of the goods, authorizing them to obtain possession of the goods, on account of and for the use and benefit of Turing and Son, which the defendants received on the 28th of August 1786. On the arrival of the vessel with the goods at Liverpool

CHAP. IV. Liverpool on the 28th of August 1786, the defendants applied to Holmes for the goods, producing the bill of lading, and he thereupon delivered them, and the defendants took possession of them for and on account of Turing and Son. The defendants sold the goods on the account of Turing and Son, the proceeds whereof amounted to five hundred and fifty-seven pounds. Before the bringing of the action, the plaintiffs demanded the goods of the defendants, and tendered them the freight and charges; but neither the plaintiffs nor Freeman had paid or offered to pay the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer. After two arguments the court held that the indorsement of the bill of lading in this case transferred the property to the assignee, and completely divested the right of the consignor to stop the goods *in transitu*. And it was laid down as a general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. And here the consignor having indorsed the bill of lading in blank, he enabled the consignee to transfer it, (the assignee might fill up the indorsement with his own name, which would be the same in effect as if it had been indorsed to him by name) could not reclaim the goods after they had passed into the hands of an innocent assignee. And accordingly they gave judgment for the plaintiff. This judgment was afterwards reversed on a writ of error in the Exchequer Chamber (*m*); and a second writ of error having been brought in the House of Lords, a *venire de novo* was awarded (*n*). The cause was accordingly tried again, when a special verdict was found, stating, amongst

(*m*) 1 H. Bl. 357.

(*n*) 2 H. Bl. 211.—5 T. R. 367.

other

other things, " that by the custom of merchants, bills of " lading, expressing goods or merchandizes to have been " shipped by any person or persons to be delivered to " order or assigns, have been and are, at any time after " such goods have been shipped and before the voyage " performed for which they have been and are shipped, " negotiable and transferable by the shipper or shippers " of such goods to any other person or persons, by such " shipper or shippers indorsing such bills of lading with " his her or their name or names, and delivering or trans- " mitting the same so indorsed, or causing the same to be " so delivered or transmitted to such other person or " persons; and that by such indorsement and delivery, " or transmission, the property in such goods hath been " and is transferred and passed to such other person or " persons. And that indorsements of bills of lading in " blank, that is to say, by the shipper or shippers, with " their names only, have been and are and may be filled " up by the person or persons to whom they are so deli- " vered or transmitted as aforesaid, with words ordering " the delivery of the goods or contents of such bills of " lading, to be made to such person or persons—And " that the same, when filled up, have the same operation " and effect as if the same had been made or done by " such shipper or shippers where he she or they in- " dorsed the same bills of lading with their names as " aforesaid (*o*)."

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The court, understanding that it was intended that this case should again be carried up to the House of Lords, declined entering into a discussion of it, merely saying, that they still retained the opinion delivered in the former case. And they accordingly gave judgment for the plaintiff.

(*o*) 5 T. R. 685.—And see 1 Bos. and Pull. 564.

A writ

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A writ of error was afterwards brought, but subsequently abandoned, and the judgment acquiesced in.

So if the transaction be *bonâ fide*, the property of the goods passes to the assignee of the consignee for a valuable consideration, although such assignee knew at the time that the consignor had not received payment in money for his goods; but had taken the consignee's acceptance payable at a future day, not then arrived: and by such assignment the consignor's right to stop *in transitu* is defeated.

Trover for a quantity of Madeira wine and brandy (*p*).

The wines and brandies in question were consigned by Philip Jean of Jersey, to Edward Main in London, and were shipped on board the Britannia, of which the defendant was master. The plaintiff claimed as assignee of a bill of lading, whereby they were to be delivered "unto Edward Main, or to his assigns, he or they paying freight, &c." The invoice of the wines, which stated that they had been bought for account of E. Main of London, was transmitted to Main by Jean in a letter of the 31st of December 1806; and in another letter of the 17th of February 1807, Jean transmitted the bill of lading for the same; at the foot of the invoice was written "payable in bill on London at three months from the 20th of December" (1806), and marked with Main's initials. The bill of lading bore date the 14th of February 1807. Jean drew a bill on Main for the value of these goods, dated the 20th December 1806, at three months, which bill, due the 23d of March 1807, was accepted by Main; and on the 23d of February 1807, Main indorsed the bill of lading in question, to the plaintiff for a full and valuable consideration; and

(*p*) Cuming *v.* Brown, 9 East 506, 1 Campb. N. P. C. 104. S. C.

absconded

absconded about April, and was not afterwards heard of, leaving his acceptance unpaid. The goods arrived in London about the beginning of June, and were demanded by the plaintiff of the defendant, who refused to deliver them, having been indemnified by the agent of Jean, who on notice of the absconding and insolvency of Main, claimed to stop them *in transitu*. On the part of the defendant, the answer of the plaintiff to a bill in Chancery filed by Brown and Jean was read, whereby the consideration for the indorsement appeared, and also that at the time of the indorsement the plaintiff had no knowledge or belief that Main had stopped payment, or was unable to pay his debts, and that the plaintiff had no suspicion of his insolvency, and "that "the plaintiff understood and believed at the time that "the pipes of wine in question had been sold to and "purchased by Main, in the course of trade; *and that* "*although the plaintiff was aware that they had not* "*then been actually paid for by Main, or by any other* "*person; yet he concluded that the same would be paid* "*for or credit given to Jean by Main in the course of* "*their business together*;" and he negatived the charge of collusion. The question was, whether the indorsement of the bill of lading in this case passed the property of the goods, the plaintiff having notice that the goods had not been paid for *in money*, such indorsement being made *bonâ fide*, for valuable consideration, and without notice of any circumstance which in fairness ought to have prevented the plaintiff from taking it, (unless notice that the goods had not been paid for in money, be such circumstance)?

The court, observing that the doubt which had been thrown on this subject arose principally from the words "*without notice*," which are to be found in the case of

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Salomons *v.* Nissen and other cases on this subject; thought that, according to the general scope and meaning of the passages in the opinions of the judges, where this expression occurs, it is not to be understood in the restrained sense which had been contended for; viz. "*without notice that the goods had not been paid for*"; but, "*without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable.*" And so understanding such expression, *or at any rate so understanding the rule of law on the subject*, they held that in this case no circumstance appeared to have existed at the time of the assignment of this bill of lading, which ought to have prevented the plaintiff from taking it, or which ought to render it unavailable in his hands.

But if any *indicia* of fraud, or any circumstance which shews that the indorsee ought not in fairness to have taken the indorsement appear, the title of such indorsee under the bill of lading is defeated, as between him and the consignor, who in such case may exercise the right of stoppage *in transitu*; thus

In trover by the assignees of Scott a bankrupt (*q*) for a quantity of wheat and beans. It appeared that Fontaine a merchant in London, on the 4th of June 1766, shipped the goods in question on board the Two Friends for Liverpool, and took bills of lading for the same deliverable "unto order or to assigns," and afterwards on the same day indorsed one of the bills of lading to "Mr. Richard Swanwick or order," and transmitted the same so indorsed to Swanwick. That on the 2nd of July following, Swanwick being arrested for the sum of four hundred pounds, applied to Scott (who was also a

(*q*) Wright and another assignees &c. *v.* Campbell and another, 4 Burr. 2046.—1 Blac. 628, S. C.

merchant

merchant in Liverpool, and with whom Swanwick had had dealings, and was then indebted to in the sum of eight hundred pounds) to become bail for him, which Scott refused to do, unless Swanwick would indemnify him and also secure his debt. Upon this Swanwick produced the bill of lading which he had received, indorsed by Fontaine, and offered to indorse it to Scott, assuring him that the goods comprized in it were his own property. This was agreed to, and Scott became bail accordingly, and the bill of lading was indorsed to him. Subsequently to this transaction, Fontaine applied to Scott and informed him of the real fact, that Swanwick was only a factor and not the proprietor of the goods; and he accordingly claimed the goods, which Scott refused to deliver up. Scott and Swanwick soon after both became bankrupts. The defendants claimed under an indorsement of one of the other bills of lading, from Fontaine. It being suggested that there was a fraudulent collusion between Scott and Swanwick, the material question was—whether this was a fair transaction between Swanwick and Scott, for a valuable consideration, and without notice, or a trick and contrivance between them to cheat an honest owner out of his property? It which latter case it was agreed that the claim of Scott could not be supported, but the case being imperfectly stated as to that fact; a new trial was ordered.

So in trover for seven hundred and five pigs of lead (*r*) the case was; that Edward Hague bought the lead of the defendants in Liverpool, and ordered it to be shipped to Rouen in France. The lead was of the value of one thousand pounds. The said lead was accordingly shipped on the 10th of March 1787, at Chester, on

(*r*) Salomons *v.* Nissen and another, 2 T. R. 674.

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board the Jane; and the bill of lading was indorsed by the defendants in blank, and sent to Hague. On the 16th of March 1787, the plaintiff gave Hague his acceptances for seven hundred pounds, upon which Hague delivered the bill of lading to him. These acceptances were paid by the plaintiff when due. On the 21st of March 1787, the plaintiff and Hague entered into an agreement that the plaintiff should pay the consignor for the lead; and that the money should be remitted to him for which the consignee might sell the lead. And that the profit or loss of the cargo should be divided between Hague and the plaintiff. The vessel sailed with the lead for Rouen in March in 1787, but was forced back by stress of weather to Chester; and Hague having become bankrupt, and the defendants not having been paid the price of the goods, they, on that account, on or about the 5th of April stopped the said goods while they were on board the ship in England, and took them away. The plaintiff afterwards demanded them, but the defendants refused to deliver them, upon which the action was brought. But the court held, that it appearing upon the face of the agreement that the goods had not been paid for; the plaintiff could not be considered as a *bonâ fide* purchaser *without* notice: and also, that it appearing by the agreement that the plaintiff and Hague were partners, *quoad* this transaction, the plaintiff could not recover; accordingly there was judgment for the defendants.

If a bill of lading be made to order or assigns, the indorsement of the shipper is necessary to give it negociability. And therefore where one Fox (*s*) a wine mer-

(*s*) Nix *v.* Olive, Guildhall Sittings before Lord Ellenborough, Ch. J. after T. T. 1805, cited in Abbott on Merchant Shipping, p. 3. c. 9. p. 377.

chant

chant in London, having ordered five pipes of wine from Messrs. Abbott and Co. of Oporto; they loaded them on board a vessel bound for London, and took bills of lading for delivery to order or assigns. One of the bills they transmitted to Fox in a letter, wherein they said they had shipped the wine *on his account*, had sent him a bill of lading, and had drawn upon him for the price. Fox accepted the bill of exchange thus drawn upon him, which was payable nine months after date. Before the bill became due, the wine arrived, and Fox not being able to pay the duties, it was sent to the King's warehouse, under the statute 26 G. III. c. 59; while it remained there, Fox being indebted to one Mary Nix, and called upon for payment, and unable to pay, sold the wine to her for forty pounds then paid to him, and the amount of his debt. He became bankrupt soon afterwards; and the agents of the consignors having paid the duties, and obtained the goods, Mrs. Nix brought an action against them for the value. The cause was tried before Lord Ellenborough; and it was insisted on behalf of the plaintiff, that there was no difference between the indorsement of a bill of lading by the consignor, and the sending it inclosed in a letter of this import. But his Lordship declared himself to be of a different opinion, and held that the right of the consignor to stop the goods, was not divested under these circumstances.

There may however exist special circumstances which will be considered tantamount to an indorsement, if done *bonâ fide*, by a person having competent authority, as where Thompson and Co. of Newry (*t*), had consigned a quantity of beef to Eustace and Holland their factors in London, for the purpose of being sold; but sent the

(*t*) Dick *v.* Lumsden, Peake's N. P. C. 188.

bill

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bill of lading without indorsement. Eustace and Holland wrote to Thompson and Co. for an indorsement of the bill of lading; to which they answered, that if the bill of lading was not indorsed it was a mistake, and that they would send an indorsement: upon which Eustace and Holland sold the provisions to Boehm and Taylor.

Thompson and Co. had drawn bills on Eustace and Holland, and they not being able to pay them when they became due, the plaintiff paid them for the honour of Thompson and Co. the drawers, of whom he was in other respects a creditor; and having knowledge of all the above-mentioned transactions, he wrote to Thompson and Co. for an indorsement of the bill of lading, which they sent him. He then demanded the provisions of the defendant, the master of the ship, but Boehm and Taylor having indemnified him, he delivered the provisions to them. And an action of trover being brought, it was held by Lord Kenyon, before whom the cause was tried, that the plaintiff knowing all the circumstances of the case, could not by any subsequent act of his own, take the goods out of the possession of Boehm and Taylor. Though between persons ignorant of the transactions, an indorsement is the only transfer, yet where parties know the whole circumstances, a letter of this kind is a sufficient transfer. The bills were not drawn precisely for these goods, but on the general account. Here the factor transferred the property, and having a competent authority so to do, it was not essentially necessary that he should have the possession of the goods or an indorsement of the bill of lading.

SECT.

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SECT. III.

Of Sales contracted under the Directions of particular Statutes.

THE first object which demands our attention under this head, is the transfer of property in British ships.

Since England first began to appreciate the advantages which her insular situation afforded her for commercial pursuits; since the eyes of her legislators were first opened to the true interests of the country, and the dominion of the seas became her object; it has always been the policy of the government, by conferring peculiar privileges and immunities on the ships of our own country, to encourage that spirit of maritime adventure, which at the same time that it enriches the country, by extending her commerce, forms a nursery for seamen to man those fleets which defend her shores. It is from a perseverance in this sound policy, that while the fleets of England ride triumphant in the most distant corners of the globe, her ports have become the emporium of the universe.

In order effectually to confine such privileges to British ships only, it became necessary that there should be some public record whereby the ownership of British vessels might be known at all times: accordingly we find that the efforts of the legislature have at various times been employed in providing for a general registry of shipping (*u*). But this important branch of our maritime law, was not established upon its present footing till the passing of the statute 26 G. III. c. 60, an act for which the country is indebted to the exertions of the late Earl of Liverpool, than whom no one was better acquainted with the commercial interests of this country.

(*u*) 12 Car. II. c. 18.—7 and 8 W. III. c. 22.—15 G. II. c. 31.

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A minute detail of the several legislative provisions respecting the registry of shipping does not fall within the scope of this work, which is confined to the *transfer* of property only; as however a succinct account of the law on this subject, as it now stands, is absolutely necessary to the right understanding of this section, it is here given.

All merchant ships employed upon the sea, either in the coast-trade, or distant voyages, having a deck, or being of the burden of fifteen tons and upwards; and either built in Great Britain, or Ireland, Jersey, Guernsey, or the Isle of Man, or the colonies, plantations, islands and territories, under the dominion of his Majesty, in Asia, Africa, or America; or taken in lawful war, and condemned as prize; (except vessels not exceeding thirty tons, and not having a whole or fixed deck, and employed solely in the Newfoundland fishery (*x*)), must be registered.

Such ships, however, must be the property of a British subject, or the member of a British factory, or agent for, or co-partner in, a house carrying on trade in Great Britain or Ireland.

The place of registry is, in general, the port or place out of which the ship usually sails, and at which the husband or acting owner lives (*y*).

Where the requisites of the several statutes are complied with, and the ship duly registered, the collector and comptroller of the customs will deliver to the person or persons claiming property therein a certificate of such registry.

As to the transfer of property in British ships, it is enacted by the 34 G. III. c. 68. § 14. "That no trans-

(*x*) 27 G. 3. c. 19. § 8. and as to prizes, § 26.
(*y*) But see 26 G. 3. c. 60. § 4.

fer,

" fer, contract or agreement for transfer, of property in " any ship or vessel, made or intended to be made, after " the 1st day of January, 1795, shall be valid or effec- " tual for any purpose whatever, either in law or in " equity, unless such transfer, or contract or agreement " for transfer, of property in such ship or vessel, shall " be made by bill of sale, or instrument in writing, con- " taining such recital as prescribed by 26 G. III. c. 60." which enacts (*z*), "That when and so often as the pro- " perty in any ship or vessel, belonging to any of his " Majesty's subjects, shall be transferred to any other or " others of his Majesty's subjects, in whole or in part, " the certificate of the registry of such ship or vessel, " shall be *truly and accurately recited, in words at* " *length*, in the bill or other instrument of sale thereof, " and that otherwise such bill of sale shall be utterly " null and void to all intents and purposes".

These statutes do not extend to a bill of sale from the original builder to the first purchaser; which is good without any recital of a certificate of registry (*a*).

Nor to the sale of vessels for inland navigation only (*b*).

But a bill of sale purporting to be an absolute tranfer, of a ship at sea, though in fact only made as a security for the payment of a prior debt, is void, unless the certificate of the registry be recited therein: although the vendee had the grand bill of sale, and had taken possession of the ship immediately on her arrival: thus in

Trover for the ship Commerce (*c*); it appeared that the bankrupt being indebted to the defendants in two thousand pounds on bills which they had accepted and

(*z*) § 17.

(*a*) Oxenham *v.* Gibbs and another in B. R. T. T. 1807.

(*b*) Laroche *v.* Wakeman, Peake's, N. P. C. 141.

(*c*) Rolleston *v.* Hibbert, 3 T. R. 406.

paid

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paid for him, on the 21st of June 1788 gave them his promissory note, payable in three months: and by way of security executed to them a bill of sale of the ship Commerce, and at the same time deposited in their hands the grand bill of sale, and also a policy of insurance on the ship. The bill of sale was absolute on the face of it, and in the usual form, but it did not contain a recital of the certificate of the registry of the ship, as required by the said stat. 26. G. III. But at the time when the bankrupt executed the bill of sale, and deposited that together with the grand bill of sale and policy, with the defendants, they gave ~~them~~ him an acknowledgment in writing, promising to return the same upon the payment of the note. On the 21st of June 1788, the ship was in foreign parts, and did not arrive in England till the 22d of November 1788. The bankrupt stopped payment the 3d of July 1788; on the 18th of the same month a commission of bankrupt was issued against him, under which his property was assigned to the plaintiffs. Immediately after the ship's arrival in England the defendants took possession of her, and continued in possession. At the time of the execution of the bill of sale the bankrupt appeared to have been solvent, and it also appeared that the bill of sale was not executed in contemplation of bankruptcy.—The court held that the sale was absolutely void, the requisites of the statute not having been complied with, and also that the defendants could not retain the ship, as having a lien on her against the general creditors of the bankrupt (*d*).

But a mere clerical mistake in the recital of the certificate of registry will not avoid the bill of sale;

(*d*) And see the case of the New Draper, 4 Rob. Ad. Rep. 287.

as

as where in a bill of sale of the ship Scipio (*e*); the certificate of registry as recited, stated, "that the said "ship or vessel was foreign built, formerly called the "Superb, taken prize from the French King's subjects, "by his Majesty's ship Fortitude, George Keppel, Esq. "commander, and legally condemned in the High "Court of Admiralty, as by sentence of condemnation, "dated the 28th of May 1783, and made free, as by "a certificate of freedom granted at London the 28th "of January 1783, appears, &c."—whereas it appeared that the date of the condemnation of the ship Scipio, was on the 28th of May 1782, and the date of the certificate of freedom the 28th of January 1783, in the collector's, comptroller's, and secretary's books at the custom-house, and in the certificate of registry itself; but in the register-general's books, the date of the condemnation was on the 28th of May 1783, and that reference was had to that office for a copy of the certificate of the ship's register (the ship being then at sea) in order to fill up the bill of sale. It appeared that either of the four offices is a proper office for such reference.

The court held, that it appearing in the recital, that the certificate of freedom was dated in January 1783, and the condemnation in May 1783, it was impossible that the latter could be correct, inasmuch as the certificate of freedom would then bear date prior to the condemnation. It was therefore apparent on the face of the instrument itself, that some error must have crept into the copy of the certificate of registry, which was inserted in the bill of sale. And as it appeared that the

(*e*) Rolleston and others, assignees, &c. *v.* Smith, 4 T. R. 161.

parties

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parties to the bill of sale applied to the proper office for copy of the certificate entered in the public books there, which they inserted in the bill of sale *verbatim et literatim*, as it was there entered; not being able to have recourse to the original certificate, which was necessarily on board the ship then at sea, that they had taken every step they could to comply with the requisites of the statute, and that therefore the bill of sale was valid notwithstanding that mistake. And that even supposing that the parties had had an opportunity of seeing the original certificate, it would be too much to say, that a mere clerical mistake should render the bill of sale null and void, and that under such circumstances the court will lean to support a fair and honest transaction, *ut res magis valeat quam pereat.*

But where (*f*) the certificate of registry of the ship St. Vincent, stated that one part owner had taken and subscribed the *affirmation* required by the act, and that he together with Joseph Wharton of Scarborough, (in the county of York, merchant, who was not resident within twenty miles of London, and had not absented himself to avoid taking the said affirmation or oath) were sole owners of the ship or vessel called the St. Vincent of London, whereof *William Prior* was at that time master—and in the description of the vessel, that her length from the fore part of the main-stern to the after part of the stern-post aloft was one hundred and four feet, her breadth *at* the broadest part of the main wales twenty seven feet six inches, her height between the decks four feet nine inches, and that she measured three hundred and forty three tons, that she was a round lute-sterned ship, with quarter-badges, &c. And

(*f*) Westerdell *v.* Dale, 7 T. R. 306.

that

that the subscribing *owner* had consented and agreed to the above description and admeasurement, &c. But in a bill of sale of the said ship, the certificate as recited, stated that the part owner had taken and subscribed the *oath* required, &c. and omitted all the words within brackets, described *J. Lotherington* as the master instead of William Prior, set forth the dimensions in *figures* described her breadth *above* the broadest part of the main wales to be twenty seven feet six inches, and stated that the subscribing *owners* had consented, &c. The court held the mis-recital to be fatal, and that the bill of sale was clearly void.

An *indorsement* on a certificate of registry made in pursuance of the statutes, 7 and 8 W. III. c. 22. § 21. and 26 G. III. c. 60. § 16. is not within the 17th section of the latter statute, and consequently need not be recited in a bill of sale.

Trover for the ship Castor and Pollux (*g*), at the trial before Eyre, C. J. it appeared that the ship having been built in the year 1790, was transferred by the builders to the present defendant under the grand bill of sale, when a certificate of British registry was obtained by the defendant for himself as owner and master, and several voyages in her were performed by him as such; that in 1791 the defendant having had considerable dealings with G. Lempriere, a merchant in London, and being then indebted, and likely to become more so to him, assigned the Castor and Pollux by way of security, and delivered possession of the grand bill of sale; that in the deed of assignment the certificate of the registry of the ship was truly and accurately recited in words at length pursuant to the directions of 26 G. III. c. 60. § 17; that

(*g*) Capadose *v.* Codnor, 1 Bos. and Pull. 483.

on

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on the 3d of April 1792 Lempriere in consequence of some transactions by which he became indebted to the plaintiff, executed to him an indenture, which, after reciting the assignment from the defendant, and the debt due from him to Lempriere, as well as that from Lempriere to the plaintiff, assigned his interest in the ship to the latter, subject to redemption on payment of the money due on the 2d of July following; that in this deed also the certificate of the ship's registry was truly and accurately set forth; that at the time of the assignment the defendant was on a voyage with the ship and acting as master, and that previous to his return, Lempriere having become bankrupt, he refused to deliver up the ship to the plaintiff.—The objection taken at the trial to the plaintiff's recovery, was, that neither in the assignment to Lempriere, nor in that to the plaintiff was there any recital of such indorsement of the change of property made on the certificate of registry as was required by the 7 and 8 W. III. c. 22. and 26 G. III. c. 60. § 16.—A verdict was found for the plaintiff, with liberty to the defendant to move to set it aside, and have a verdict entered the other way.

Accordingly a rule *Nisi* for that purpose having been obtained, upon shewing cause, the court were of opinion that such recitals were not required by the 26 G. III. and therefore ordered the postea to the plaintiff.

And it seems that no alteration in the law in this respect, is made by 34 G. III. c. 68. § 15.

Where the certificate was mis-recited by mistake, as by stating *Guernsey* as the port where the certificate was granted instead of Weymouth; which mistake was rectified, when discovered, by consent of all the parties, and the deed delivered *de novo:* no new stamp is necessary upon re-execution; the deed taking no effect from

from its first delivery, and the defect not arising from any intention, but from mistake, and the alteration merely making the contract what it was originally intended to have been (*h*).

It may also be observed, that a bill of sale not conformable to the statute is so completely void, that it gives no title even in equity (*i*).

But these are not the only legislative provisions which have been made for regulating the transfer of this species of property: the other requisites introduced by the different statutes arrange themselves into two classes, 1st Where the transfer is made in the port to which the ship belongs. 2d When the transfer is made during the absence of the ship from such port. According to this division the subject will be treated; extracts of the several acts of parliament as applicable to each case, will be given, and the decisions to which they have given rise subjoined, by way of comment.

First, Where the transfer of property in a British ship, is made while such ship is in the port to which she belongs.

By the statute of William (*j*) it is enacted; "that in "case there be any alteration of property, in *the same* "*port*, by the sale of one or more shares in any ship, "after registering thereof, such sale shall also be ac- "knowledged by indorsement on the certificate of the "register before two witnesses, in order to prove that "entire property in such ship remains to some of the "subjects of England, if any dispute arises concerning

(*h*) Cole and others, assignees of Doyle a bankrupt, against Parkin, 12 East 471.

(*i*) Camden and others *v.* Anderson, 5 T. R. 709.--and Hibbert *v.* Rolleston, 3 Bro. Ch. Cas. 571.

(*j*) 7 and 8 W. 3. c. 22. § 21.

"the

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"the same." And by a subsequent statute (*k*); reciting that the provisions made by the last mentioned act touching the indorsement on certificates of registry, in case of any alteration of the property in any ship or vessel, in the same port to which the ship or vessel belongs, had been found insufficient; it is enacted, "That in every "such case besides the indorsement required by the said "recited act, there shall also be indorsed on the certi- "ficate of registry, before two witnesses, the town, "place, or parish, which all and every person or per- "sons to whom the property in any ship or vessel, or "any part thereof, shall be so transferred shall reside; "or if such person or persons usually reside in any "country not under the dominion of his Majesty, his "heirs and successors, but in some British factory, the "name of such factory of which such person or persons is "or are a member or members; or if such person or per- "sons reside in any foreign town or city, and are not mem- "bers of some British factory, the name of such foreign "town or city where such person or persons usually re- "side, and also the names of the house or co-partner- "ship in Great Britain or Ireland, for or with whom such "person or persons is or are agent or partner, or agents "or partners; and the person or persons to whom the "property of such ship or vessel shall be so transferred, "or his or their agent, shall also deliver a copy of such "indorsement to the person or persons authorized to "make registry, and grant certificates of registry as "aforesaid, who are thereby required to cause an entry "thereof to be indorsed on the oath or affidavit upon "which the original certificate of registry of such ship "or vessel was obtained; and shall also make a memo-

(*k*) 26 G. 3. 60. cap. § 16.

"randum

" randum of the same in the book of registers which is
" thereby directed and required to be kept, and shall
" forthwith give notice thereof to the commissioners of
" his Majesty's customs in England or Scotland, under
" whom they respectively act". And by the 34th of the present King (*l*), reciting, that by the laws then in force, upon any alteration of the property in any ship or vessel in the same port to which such ship or vessel belongs, an indorsement upon the certificate of registry is required to be made,—it is enacted, " That such indorse-
" ment shall from and after the 1st day of January 1795
" be made in the manner and form thereinafter express-
" ed, and shall be signed by the person or persons trans-
" ferring the property of the said ship or vessel, by sale,
" or contract or agreement for sale thereof, or by some
" person legally authorized for that purpose by him,
" her, or them, and a copy of such indorsement
" shall be delivered to the person or persons autho-
" rized to make registry, and grant certificates of re-
" gistry, otherwise such sale, or contract or agreement
" for the sale thereof, *shall be utterly null and void, to*
" *all intents and purposes whatever;* and such person
" or persons so authorized to make registry, and grant
" certificates of registry, are thereby required to cause
" an entry thereof to be indorsed on the oath or affida-
" vit upon which the original certificate of registry of
" such ship or vessel was obtained, and shall also make
" a memorandum of the same in the book of registry,
" and shall forthwith give notice thereof to the com-
" missioners of his Majesty's customs in England and
" Scotland, under whom they respectively act."

Form of indorsement on change of property:

" Be it remembered, that (I, *or*, we) *(names, residence,*

(*l*) 34 G. 3. c. 68. § 15.

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" *occupation, of the persons selling)* have this day sold " and transferred all (my, *or*, our) right, share, or in- " terest, in and to the ship or vessel *(name of the ship* " *or vessel)*, mentioned in the within certificate of re- " gistry, unto *(names, residence, and occupation, of the* " *purchasers)*. Witness (my, *or* our, hand, *or*, hands) this " *(date in words at full length)*.

" Signed in the presence of

" *(two witnesses)*."

And by the same statute (*m*), reciting the before mentioned clause of the statute of King William; and that it was found expedient to authorize and require the proper officers impowered to register ships and vessels, and to grant certificates thereof, to issue registers *de novo* in any case where part of the property of any ship or vessel shall be so transferred, if the owners or proprietors of such ship or vessel, who were owners thereof at the time such ship or vessel was last registered, or whose property therein has not been so transferred, shall be desirous of having a certificate of registry *de novo*, instead of the indorsement on the old register: it was therefore enacted, " That in case there shall be any alteration of pro- " perty *in the same port*, by the sale of one or more " shares in any ship or vessel, after registering thereof, " and the owner or owners, proprietor or proprietors, of " such ship or vessel, who were owners or proprietors " thereof at the time such ship or vessel was last re- " gistered, or whose property therein has not been so " transferred, shall be desirous of having the ship or " vessel registered *de novo*, it shall and may be lawful to " and for the proper officers impowered to register ships " and vessels, and to grant certificates thereof, and such " officers are thereby authorized and required to register

(*m*) § 21.

every

" every such ship or vessel *de novo*, provided all the rules, " regulations, and conditions of the before recited act " passed in the 26th year of the reign of his present " Majesty (*n*), and of all other laws in force concern- " ing the registry of ships and vessels *de novo* be com- " plied with."

The indorsement directed by these acts of parliament to be made upon the certificate, must be made upon a certificate which is valid and in force at the time; and such indorsement upon a certificate which has been delivered up to be cancelled, though such cancellation was done under a mistake, is of no avail: thus;

In trover to recover the value of the ship " Samaritan's " Hope (*o*)," a verdict was found for the plaintiffs subject to the opinion of the court, upon a case stating in substance: that Twemlow and M'Dowal of Liverpool, were owners of the ship in question, then belonging and lying in the port of Liverpool, and that they by bill of sale, dated the 6th of July 1799 assigned her for a valuable consideration to Kirkpatrick, then also resident in Liverpool. In the bill of sale, a certificate of registry *de novo* of the said ship, in the names of Twemlow and M'Dowal, at the port of Liverpool, was duly recited. The recited certificate was dated Liverpool, 17th of July 1799, and had a memorandum written on it, that the former one granted at Scarborough, had been taken away by the enemy, and that the vessel had been permitted to be registered *de novo*, by order from the commissioners of the customs. There was also the regular indorsement to Kirkpatrick; dated the 29th of July 1799. But the indorsement was not signed on the 29th of July by Twemlow and M'Dowal, or by any person authorized by them;

(*n*) 26 G. 3. c. 60.

(*o*) Moss and another assignees, *v.* Mills and another, 6 East 144.

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nor was such indorsement signed till the 24th of June 1802. On the 29th of July 1799, Kirkpatrick had the ship registered at the port of Liverpool in his own name, when the certificate of registry granted to Twemlow and M'Dowal, and on which the indorsement had been made, was delivered up and cancelled, which fact was recited in the new certificate granted to Kirkpatrick. Kirkpatrick took possession of the ship, and exercised acts of ownership in respect thereof; and in February 1800, by bill of sale, reciting the said certificate of registry granted to Twemlow and M'Dowal, assigned the ship for a valuable consideration to Young and Glennie, who then resided in London; and they in August 1800, by bill of sale, assigned the same for a valuable consideration to Hamilton and Touray then also residing in London. Hamilton and Touray assigned to the defendant Mills; but no indorsement was made on any certificate of registry, in respect of any of these last mentioned assignments, nor was any copy of the bills of sale delivered, or any other of the requisites of the register acts complied with.—The defendant Mills immediately after the sale to him took possession of the ship; the bill of sale from Twemlow and Co. to Kirkpatrick was in his possession. In November 1800, Kirkpatrick became a bankrupt, and the plaintiffs were appointed his assignees.—After he had obtained his certificate (*i. e.*) on the 24th *of June*, 1802, he signed the indorsement on the certificate dated 29th of July 1799, in the presence of two witnesses: after which the plaintiffs demanded the ship.—The question was, Whether they were entitled to recover? The court held that they were not; the transfer under which they derived their supposed title not having been made in the manner prescribed by the acts of parliament, which by indorsement must mean indorsement upon an *existing*

existing instrument. But in this case it was made upon a cancelled certificate, which was then inoperative.

And it seems that the requisites of the register acts, when the ship is in port, should be complied with immediately: at any rate no property passes to the vendee till such requisites are complied with. And a subsequent compliance will in no case be available by relation to the time of the contract of sale, so as to make the conveyance effectual for any antecedent time. But where the intermediate interests of third persons do not intervene, such requisites may be complied with at any time (*p*).

2dly, As to the manner in which a transfer of property is to be made in ships absent from their port; it is provided (*q*), "That if any ship or vessel shall be at sea, or "absent from the port to which she belongs, at the time "when such alteration in the property thereof shall be "made as aforesaid, so that an indorsement *or* * certifi- "cate cannot be *immediately* made, the sale, or con- "tract or agreement for the sale thereof, shall notwith- "standing be made by a bill of sale, or other instru- "ment in writing as before directed, and a copy of such "bill of sale or other instrument in writing, shall be de- "livered, and an entry thereof shall be indorsed on the "oath or affidavit, and a memorandum thereof shall be "made in the book of registers, and notice of the same "shall be given to the commissioners of the customs in "the manner thereinbefore directed; and within ten "days after such ship or vessel shall return to the port

(*p*) Moss and another assignees, &c. *v.* Charnock, 2 East. 399.

(*q*) 34 G. 3. c. 68, § 16.

* This is an error in the printed statute, it should be, "indorsement "*on* the certificate", Heath *v.* Hubbard, 4 East. 120. n.

to

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" to which she belongs, an indorsement shall be made " and signed by the owner or owners, or some person " legally authorized for that purpose by him, her, or " them, and a copy thereof shall be delivered in man- " ner thereinbefore mentioned, otherwise such bill of sale, " or contract or agreement for sale thereof, shall be " utterly null and void to all intents and purposes what- " soever, and entry thereof shall be indorsed, and a " memorandum thereof made in the manner therein- " before directed."

And where the owners reside in any place not in the King's dominions, on which account it is impossible for them to comply with the regulations of the register acts immediately; it is provided (*r*), "That in " all cases where the owner or owners of any ship or " vessel shall reside in any country not under the domi- " nion of his Majesty, his heirs and successors, as " member or members of some British factory, or agent " or agents for, or partner or partners in, any house or " co-partnership actually carying on trade in Great " Britain or Ireland at the time when he, she, or they " shall transfer such property in any ship or vessel, so " that an indorsement cannot be made immediately, nor " a copy of such bill of sale, or other instrument in writing " be delivered, nor an entry thereof indorsed on the " oath or affidavit, nor a memorandum thereof made in " the book of registers, nor notice of the same given to the " commissioners of the customs, in the manner before men- " tioned, the same may be done at time within *six months* " after such transfer shall have been made, and that within " *ten days* after such owner or owners, or some person " legally authorized for that purpose by him, her, or " them, shall arrive in this kingdom, if such ship or ves-

(*r*) 34 G. 3. c. 68, § 17.

sel

" sel shall then be in any port of this kingdom, and if " not, then within *ten days* after such ship or vessel shall " so arrive, an indorsement shall be made by the owner or " owners, or some person legally authorized for that " purpose by him, her or them, and a copy thereof shall " be delivered in manner thereinbefore mentioned, other- " wise such bill of sale, or contract or agreement for " sale thereof, shall be utterly null and void, to all in- " tents and purposes whatsoever, and entry thereof shall " be indorsed, and a memorandum thereof made, in the " manner thereinbefore directed."

Where a transfer is made under these provisions, it is of importance to the vendee to see that the register acts are complied with, so far as they can be in the absence of the ship, on board which the certificate of the registry is always supposed to be; and also that the grand bill of sale be delivered to the vendee, which delivery in the case of a ship at sea, has been held to be equivalent to a delivery of the ship itself (*s*). And where the directions of the statute are not attended to, no property passes to the vendee,—as the following case will shew.

Trover for the ship Mary Ann (*t*). The plaintiffs were assignees of Kirkpatrick a bankrupt, the defendant claimed as vendee of Kirkpatrick before his bankruptcy.—The facts of the case were shortly these: Kirkpatrick being indebted to the defendant in more than the value of his share of the ship, in August 1800 made a bill of sale thereof to the defendant, and sent it to him; but the defendant declined accepting of it till the 15th of November following; and on the 19th Kirkpatrick became a bankrupt. On the 5th of December, *and not before*,

(*s*) Atkinson *v.* Maling and others, 2 T. R. 462.

(*t*) Moss and others, assignees &c. *v.* Charnock, 2 East. 399.

the

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the requisites of the statute 34 G. III. c. 68, § 16 were complied with; and within ten days after the return of the ship to port, an indorsement was regularly made on the certificate of the registry, and the other requisites of the act complied with: but at the time of the bankruptcy, the bill of sale of two thirds of the ship from the former owners remained in the possession of Kirkpatrick.

It was contended that the plaintiffs were entitled to recover, because the requisites of the stat. 34 G. III. had not been complied with before the bankruptcy, and that consequently the sale was incomplete at that time, and no property passed to the vendee.—And of this opinion was the court; and Mr. Justice Lawrence in delivering the opinion of Le Blanc, J. and himself, after stating the clause of the act upon which the question arose; observed, "that the public will be most effectually served, by "holding, that no interest shall pass from any owner in "British ships to any other, until the public has that information which is so essential to its commercial welfare; "and the objects of the parties to such contract will be "best consulted by allowing the longest time to comply "with the requisites of the act, so as that, which was "meant to operate as a certain means of compelling "men to give that information, be not destroyed or "weakened. And this will be done by construing the "statute as enacting, *That no bill of sale or other such "instrument shall have any operation or effect, until the "requisites imposed on the parties to the sale are complied with:* and by not allowing any relation to hold "good, so as to make the conveyance effectual from any "antecedent time. By such construction the parties to "the contract will be most strongly called on to comply *immediately* with the requisites of the act; *which,*

"*not*

" *not only from its general scope, but from the words of* " *it, it is evident were intended to be done without delay.* " And the purchaser will not lose the benefit of his con- " tract, if at any time he comply with the requisites be- " fore the rights of others intervene. But if this act " were to be considered as giving an indefinite time for " the compliance with its requisites, it would enable a " transfer of property to be made to foreigners, who " might remain concealed owners, until the return " of the vessel to her port, which might not be for a " great length of time.

And in the case of a tranfer of property in a ship at sea, the legislature having fixed a specific period, after the ship's arrival, for complying with the requisites of the act; the acts thereby directed to be done, must, *at all events*, be done within the time: and therefore where some of the ten days next after the arrival in port of a ship which had been sold while at sea, and in particular the last of those days were public holidays on which no business was done at the custom house; from which cause the indorsement on the certificate of registry was not made within the ten days, it was held that no property passed to the vendee, and that the contract of sale was null and void, although the indorsement was made, and the copy delivered on the next day of business (*u*).

By the statute 7 and 8 W. III. c. 22. § 21. it is provided that upon the transfer of property in a ship, *to another port*, such ship may be registered *de novo*, in the new port, upon delivering up the former certificate to be cancelled: this clause of the statute only relates to the transfer of property in a ship *from one port of registry*

(*u*) Gillespey and others *v.* Mestaer, Guildhall Sittings after T. T. 1804, cited in Abbott on Merch. Shipping 61.

to

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to another, the property continuing in the same owner: but it does not extend to a tranfer of property *from one man to another at another port:* and therefore upon a tranfer of property in a ship from A of Newcastle (the ship's port of registry) to B of London, it is not sufficient to vest a property in B that he surrender the certificate of registry granted at Newcastle and register the ship *de novo* at London. But the requisites of the register acts must be complied with the same as if the ship had remained at her original port.—This will be illustrated by the following cases.

Trover for one third of the ship Fishburn(*x*). The material facts of the case were: that Thomas Ward being the original and sole registered owner of the ship Fishburn, belonging to the port of Newcastle-upon-Tyne, in the year 1800 sent her on a voyage to the Baltic, when she was detained at Riga by the embargo laid on ships in that port by the Emperor of Russia, upon which Ward abandoned one third of the said ship (the interest insured) to the underwriters. And by bill of sale executed in April 1801, regularly assigned the said one third part of the ship to the plaintiff, in trust for the underwriters. Afterwards, in November 1801, Ward by a regular bill of sale, assigned the whole ship Fishburn to the defendant, who then resided in London, and who on the 2nd of January 1802, registered the said ship *de novo* in the post of London, when the original certificate granted to Ward (which purported on the face of it to be of the ship Fishburn belonging to the port of Newcastle-upon-Tyne) was delivered up and cancelled. At the time of the assignment by Ward to the defendant, the grand bill of sale of the whole ship was delivered to the defendant. Who after notice of the plaintiff's claim

(*x*) Heath *v.* Hubbard, 4 East 110.

sold

sold the ship to Messrs. R. and T. Brown and T. Old. The Fishburn never returned to Newcastle, but upon the embargo being taken off she returned to Plymouth after the execution of the bill of sale by Ward to the plaintiff. *No transfer of property in the ship Fishburn or any part thereof, appeared in any document at the custom house at Newcastle subsequent that to the plaintiff.*

One of the points made (for there were several not material to our present purpose) was, that the transfer to the defendant was not made according to the register acts. Upon which Lord Ellenborough, Ch. J. in delivering the opinion of the court said. "The defendant "claims under a register *de novo* in the port of London; "contending that the ship being transferred to that port, "a register *de novo* was properly granted in pursuance "of the statute 7 and 8 W. III. c. 22. § 21. It is not "necessary on this occasion to consider what shall "amount to a transfer of a ship to another port; for "one who has no interest in a ship can have no power "to make such a tranfer; and we think that the defen-"dant in this case had not any interest;" his Lordship adverted to the provision of the statute 34 G. III. c. 68. and continued. "According to which provisions, a "copy of the bill of sale to the defendant should have "been delivered to the proper officer at the port of New-"castle, in order that an entry thereof might be in-"dorsed on the oath or affidavit, as the Fishburn was at "sea, or absent from the port to which she belonged, "when Ward sold her to the defendant; which not "having been done, that sale is void; and consequently "no register *de novo* in the port of London could be "made by the defendant, nor could any property vest "in him."

See Hubbard Wilmstone [illegible] Eun. Cam. Sc. 3. Paunch. 177.

The

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The assignees of Ward after this decision brought an action of trover against Hubbard, to recover the other two thirds of the ship, when the same point was raised and received a similar decision (*y*); and the authority of these cases was recognized in a subsequent case (*z*), which was attempted to be distinguished from the former cases, by the circumstance of the ship being at the time of the sale, in the port of London, to which she was intended to be transferred, and where the vendee lived at the time of the sale; but it was considered that that circumstance made no difference, for the ship must in every case either be in the port to which she belongs within the meaning of the 15 § of the 34 G. III. or at sea, *or absent for such port* within the 16 §; and in either case the legislature has prescribed certain forms to be observed in the transfer, which must be complied with before any *property* vests in the vendee so as to enable him to transfer the ship to another port.

By the form of indorsement on the certificate given in the 15 § of the 34 G. III. it would appear that the legislature only contemplated a transfer of *all* the vendor's interest in the ship: the words are, "*all* my (or our) right, share," &c. but it has been held that where only a part of the vendor's interest is transferred, it is a sufficient compliance with the statute, where the real interest transferred is stated in the indorsement: for the legislature only meant that the indorsement should shew what was the interest conveyed: and it would be too narrow and rigorous a construction, to hold that the form which is given in the act must be applicable to all cases; and indeed it would be impossible to follow the act, and to

(*y*) Bloxham and another assignees *v.* Hubbard, 5 East 407.

(*z*) Hayton and another *v.* Jackson, 8 East 511.

say

say "all my interest," when the vendor meant to convey a part only (*a*).

Thus much for the requisites to be performed by the *parties*, to give effect to a sale of this species of property. It will have been observed that there are also certain acts to be done by the public officers of the custom house; but the register acts are only *directory* on the public officers authorized to make registry: the vacating provisions being confined to such acts only, as are required to be done by the immediate *parties* to the sale or transfer, and not extending to the acts or omissions of strangers; and consequently any neglect of duty on the part of the officers will not render the sale void (*b*).

The regulations introduced by the register acts apply only to tranfers by the act of the parties; and do not extend to assignments from commissioners of bankrupts to assignees. This point was discussed in the case of Bloxham *v.* Hubbard (*c*), which we have already had occasion to notice for another purpose. In that case Lord Ellenborough, Ch. J. in delivering the judgment of the court expressed himself, upon that point, to the following effect. "As to the objection that the plaintiffs as assignees "ought to have derived title to themselves by a compliance "with the requisites of the statute 26 G. III. and 34 G. "III. in respect of the transfer of property in ships; it is "an objection, which, if it could prevail, would have "the effect of defeating every title that has been hitherto "made under a commission of bankrupt, to this species "of property, since the passing of those statutes. For I

(*a*) Underwood *v.* Miller and another, 1 Taunt. 387.

(*b*) Ratchford *v.* Meadows and another, 3 Esp. N. P. C. 69.—Heath *v.* Hubbard, 4 East 110—and Underwood *v.* Miller, *supra*.

(*c*) 5 East 407.

believe

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" believe that in no instance the requisites of those sta-
" tutes will be found to have been complied with, in re-
" gard to assignments by commissioners of bankrupt.
" But there is no ground for this objection. These sta-
" tutes only relate to transfers made by the act of the par-
" ties, viz. from a *former owner* to a *new owner*, and
" where the tranfer is capable of being effectuated in the
" ordinary way by the mere operation of an instrument
" of assignment from the one party to the other, and do
" not relate to transfers deriving their effect by *peculiar*
" *provision or operation of law*, as assignments by com-
" missioners of bankrupt to assignees under the bankrupt
" laws do. There the commissioners are not *former*
" *owners*; they do not *sell* in the sense in which the
" word sale is used in these statutes, 26 and 34 G. III.;
" although in pursuance of the directions of the statute
" 13 Eliz. c. 7. § 2. and other later statutes, they *make*
" *sale thereof*, in point of form, by deed indented and
" inrolled, &c. as being the means specially appointed
" and described by the latter of those statutes for the
" execution of the *power* given to the commissioners in
" this respect, for the vesting of such property of the
" bankrupt in his assignees accordingly. The form of in-
" dorsement on change of property in the 15 § of the sta-
" tute 34 G. III. c. 68. clearly shews that the *sale* therein
" meant was a *sale* from a *former proprietor*." It runs thus:
' Be it remembered, that *I*, or *we* (names, residence, and
' occupation, of the *persons selling*) have this day sold and
' tranferred all (my, or our) right, share, and interest,
' in and to the ship or vessel, &c.' " But how can com-
" missioners of bankrupt possibly be considered as per-
" sons selling any *right, share, or interest of their own*,
" within the meaning of these words (*my*, or *our*)?
" The property transferred by them is neither legally

nor

" nor equitably *theirs*: it does not vest in them for an instant; it passes by them, or rather by the act they " are directed and impowered to perform, and not " *through* them. It appears therefore to us, that the " assignments made by the commissioners of bankrupt " to the assignees of a bankrupt, were not meant by the " legislature to be comprehended in the provisions di- " rected to be pursued in respect of the transfer of pro- " perty in ships between sellers and buyers:" his Lord- ship added. " If indeed this objection were allowed, it " would also defeat the object of the provisional assign- " ment, so far as respects a bankrupt's ship, and the " crown's extent would constantly have the preference."

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It seems that an assignment of property in a ship may be made to a trustee, in trust for persons not named; though such assignment may be void as to the object of the trusts, yet, if the requisites of the acts are complied with, it is good to pass the property to the trustee (*d*).

As it was the intention of the legislature in passing the registry acts, to form a public record of the property in British ships; so such register is, in most cases conclusive evidence of the fact of ownership: it therefore behoves a vendor to see that the requisites to a legal transfer are complied with, that he may not continue to be charged as owner, as in the following case.

Action for work and labour, in repairing defendant's ship.—Plea, the general issue (*e*). It was stated, that on the 1st of October 1790, the defendant, and one J. Wharton were the sole owners of the ship St. Vincent, being a ship then belonging to the port of London, and

(*d*) Heath *v.* Hubbard, 4 East 110.

(*e*) Westerdell *v.* Dale, 7 T. R. 306.

duly

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duly registered as such, a certificate whereof was granted to the defendant and Wharton. In February 1792, the defendant by bill of sale transferred his share to Wharton; but in that bill of sale the certificate was misrecited (*f*). Afterwards in November 1792, Wharton mortgaged the ship to the defendant, and in the mortgage deed the certificate was also misrecited; and no indorsement was made on the certificate of registry of any alteration of property by transfer from the defendant to Wharton, or from Wharton to the defendant. When these transfers were made, the ship was on a voyage to Archangel, but returned to Kingston upon Hull in December 1792. In January 1793 Wharton employed the plaintiff to repair the ship, which was accordingly done and *Wharton* debited for the amount in the plaintiff's account. After the repairs had been done, in April 1793, Wharton assigned the ship to the defendant and others, which assignment was duly registered. Upon this case the court held that the assignment being clearly void *to all intents and purposes*, from the misrecital of the certificate of registry, the defendant remained part-owner of the ship, notwithstanding his attempt to transfer his interest by the sale in February 1792; and the owner being liable to repairs done to the ship (which was admitted) the defendant was liable to this demand *.

But where the legal title to a ship remained for a month after the sale in the vendor, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer

(*f*) *Vide* this case *ante* p. 236.

* The defendant did not plead the nonjoinder of his copartner in abatement.

on

on the original certificate of registry to the proper officer, pursuant to the 34 G. III. c. 68. § 15. yet it was held that the vendor was not liable during that interval, for repairs ordered by the captain, *under the direction of the vendee*, who for this purpose is a mere stranger to the vendor in point of law; and consequently had no authority, express or implied, to bind him. And this case is distinguishable from Westerdell against Dale, for that was a case of partnership, and there was no plea in abatement: Wharton, who was the same as Dale, had ordered the repairs; and the case turned upon the privity between those two. But here the vendee ordered the repairs in his own right, and there was no privity of interest between him and the vendors. In the former case the defendants liability was pursuant to the credit actually given; here it would be contrary to the credit actually given, were the vendor liable (*g*).

So in questions of interest in an action on a policy of insurance, though a *primâ facie* title may be made by evidence of acts of ownership, without the aid of documentary proof (*h*), yet if evidence be given to disprove such title, the register is the legal evidence of ownership (*i*).

As the want therefore of this documentary proof of his title may be of serious injury to a vendee, it seems but just, that if he is deprived of it from the misconduct of the vendor by his failure in complying with the registry acts, he should be answerable in damages to the vendee for any damage he may sustain from such misconduct. But how far a court of equity can give relief

(*g*) Young and another *v.* Brander and another, 8 East 10.

(*h*) Robertson *v.* French, 4 East 130.—Thomas *v.* Foyle, 5 Esp. N. P. C. 88.

(*i*) Camden and others *v.* Anderson, 5 T. R. 709.—Robertson *v.* French, *supra*.

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to a vendee who is deprived of his title to a ship by the wrongful act of the vendor, in refusing to make the regular indorsement on the certificate within the limited time, *by compelling the vendor to execute another conveyance* admits of a doubt; though the justice of the case is clearly with the vendee:—this point was agitated in the following case.

Messrs. Beatsons being owners of a certain (*k*) ship called the Atlas, by bill of sale dated the 3rd of July 1803, assigned three-fourths of the ship, then at sea, freighted by the East India Company, with a proportion of the freight, to the plaintiff; but the indorsement upon the certificate of registry, not being made within ten days after the return of the ship to port, an action of trover (*l*) was brought by the defendants, the assignees under a commission of bankrupt, issued against the Beatsons, and judgment being recovered by the plaintiffs in that action, a bill was filed in the Court of Chancery for an injunction to restrain the defendants from issuing execution upon the judgment and for other purposes. The circumstance which prevented the indorsement of the certificate appeared upon the bill and answer (though not distinctly) to be, that Beatsons proposed some alteration in the original agreement, as to the payment of the consideration, which gave rise to some negociation, pending which the time expired. A motion being made for an injunction, the case was twice argued; once before the Lord Chancellor Eldon, and again before his Lordship, assisted by Sir W. Grant, the Master of the Rolls. Upon the first argument, it seemed to be admitted by the defendant's counsel, that the court might grant relief against the positive terms of the act of parliament, had not the rights of

(*k*) Mestaer *v.* Gillespey, 11 Vesey junr. 621. (*l*) *Ante* 249.

third

third persons intervened; and that had the question been only between the plaintiff and the bankrupts, they might be compelled to execute a proper conveyance. But the Lord Chancellor was clear that the bankruptcy made no difference in the case; that whatever right might have been obtained against the bankrupts might be had against the assignees. But upon the principle point both the Lord Chancellor and his Honor the Master of the Rolls seem to have entertained great doubts; but as the fact, that the defendants had wrongfully refused to comply with the requisites of the register acts, did not sufficiently appear; an issue was directed to ascertain that fact. The issue was accordingly tried before Lord Ellenborough, C. J. and a special Jury at Guildhall Sittings after M. T. 1804, when a verdict was found establishing that the Beatsons had wilfully and wrongfully prevented Mestaer from obtaining the indorsement. After this verdict the motion was again argued before the Lord Chancellor and the Master of the Rolls: but a compromise afterwards taking place no judgment was given.

Notwithstanding no judgment was given in this case, so that the question may still be considered as open, it is to be collected from the reasoning of the Lord Chancellor and also of his Honor, that the inclination of their opinions was in favour of the plaintiff.

There are also other articles, the sale of which is re-regulated by statute, either as to the place of sale, or mode of selling. Of the first description are woollen and linen cloths; it being enacted by the 1 and 2 P. and M. c. 7. § 2. that no person living in the country out of any city, borough, town-corporate, or market-town, "shall "sell *by retail* any woollen cloth, linen cloth, haber-"dashery wares, grocery wares, or mercery wares, at or

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" within any city, borough, town corporate, or market-
" town, or within the suburbs or limits thereof (*except it*
" *be in open fairs*) upon pain of forfeiting for each offence
" the sum of six shillings and eight pence, and the whole
" wares so sold or offered to be sold." By the third section this act is declared not to extend to sales " by
" wholesale in gross, and not by retail." And the fifth section provides that the act shall not hinder a person from selling by retail or otherwise, all manner of cloth, linen or woollen, *of his own making*, in any city, &c. as freely as he might before the making of that act.

The act speaks of persons living in the county out of *any* city, borough, &c. and therefore the inhabitants of one city, borough, &c. are not prohibited from selling woollen cloth, &c. by retail in other cities, boroughs, &c. though not in open fair (*m*).

Among the class of sales regulated by statute, we may reckon the sale of a distress taken for rent, which is given by the statute of William and Mary, and must be made according to the directions of the statute, which enacts (*n*), " that where any goods shall be distrained for
" *rent* reserved and due upon any demise, lease, or con-
" tract whatsoever, and the tenant or owner of the goods
" distrained, shall not within five days next after such dis-
" tress taken, and notice thereof (with the cause of such
" taking) left at the chief mansion house, or other most
" notorious place on the premises, replevy the same; in
" such case the person distraining shall, with the sheriff
" or under sheriff of the county, or with the constable
" of the hundred, parish, or place, where such distress
" shall be taken, cause the goods so distrained to be ap-
" praised by two sworn appraisers (whom such sheriff,

(*m*) Davis *v.* Leving, 2 Lev. 89.—Lee *v.* White and others, Dougl. 256.

(*n*) 2 W. and M. sess. I. c. 5. § 2.

" under-sheriff,

" under-sheriff, or constable, shall swear to appraise the " same truly, according to the best of their understand- " ing); and after such appraisement, shall sell the same " for the best price that can be gotten for them, for satis- " faction of the rent, and charges of the distress, ap- " praisement, and sale; leaving the overplus (if any) " with the sheriff, under-sheriff, or constable, for the " owner's use." And by a subsequent statute (*o*), the goods distrained may be secured and sold upon the premises, in like manner, and under the like directions, as under the 2 W. and M. But by the ninth section, if the distress is removed from the premises, " notice of the " place where the goods and chattels so distrained shall " be lodged, shall, within a week, be given to the tenant, " or left at his last place of abode."

Upon those statutes the following points have been decided.

That it is not necessary in the notice of distress to set forth when the rent became due (*p*).

That the five days mentioned in the statute are inclusive of the day of sale (*q*).

That though the act directs the notice to be left at the chief mansion house, or other notorious place on the premises, yet personal service of the notice on the tenant of the premises, is good; the intention of the act being that he should have notice, and that object being effected by such service more certainly than by the method pointed out (*r*).

That the oath cannot be administered to the appraiser, by a headborough if a constable be present (*s*).

(*o*) 11 G. 2. c. 19. § 10.

(*p*) Moss *v.* Gallimore, Doug. 279.

(*q*) Wallace *v.* King and another, 1 H. Bl. 13.

(*r*) Walter *v.* Rumball, 1 Lord Raym. 53.—1 Salk. 247.—4 Mod. 389. S. C.

(*s*) Broome *v.* Rice, 2 Stra. 873.

Neither

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Neither can the person distraining be sworn one of the appraisers; for the statute says, that he with the sheriff, &c. shall *cause* the goods to be appraised, &c. (*t*).

As to the mode of selling a distress under a warrant from a justice of the peace; it is enacted by 27 G. II. c. 20. "that the justice granting the warrant of distress, "shall therein order and direct, that the goods distrained shall be sold, within a certain limited time, not "being less than four, or more than eight days; unless the "penalty or sum of money distrained for, with the reasonable charges of the distress, be sooner paid. And "after such sale, the overplus (if any) is to be returned "on demand to the owner of the goods distrained."

The requisites introduced by these statutes ought to be strictly pursued, in order to render the sale legal. At common law a distress could not be sold; but we have seen that in certain cases a power to sell is given by statute; but such sale is to be made in a certain form. The requisites therefore of these statutes, are in the nature of conditions precedent to the distrainor's right to sell; and if not complied with the sale is a tortious act and could not formerly in any case divest the property of the distrainor. But *now* by the stat. 11 G. II. c. 19. § 19. it is provided "that where any distress shall be "made for any kind of *rent* justly due, and any irregularity shall be afterwards done by the party distraining "or his agent; *the distress shall not be deemed unlawful, nor the distrainor a trespasser ab initio;* but the "party grieved may recover satisfaction for the special "damage in an action of trespass, or on the case at his "election."

(*t*) Andrews *v.* Russel, Bull. N. P. 81.

And

And by 17 G. III. c. 38. "Where any distress is made for money due for the relief of the poor, it shall "not be deemed unlawful, nor the party making it "a trespasser on account of any defect or want of form "in the warrant of appointment of the overseers, or in "the rate or assessments, or in the warrant of distress "thereon; nor shall the party be deemed a trespasser *ab* "*initio* on account of any irregularity which shall after- "wards be done by him, but the party grieved may "recover for the special damage, &c." The object of these statutes being to relieve the distrainor from the consequence of any *irregularity* in the proceedings, which formerly made him a trespasser *ab initio*, and consequently avoided any sale made under such tortious distress; it would seem that at present any *irregularity* in the distress will not avoid a sale of the goods distrained, but the party grieved is left to his action for special damage under the statute.

But the king might sell a distress for rent at common law (*v*), and consequently as he is not named in the statute, his common law right remains, and therefore a sale under a distress taken for rent due to the crown need not be made in the form prescribed by the act of parliament.

To this head, of sales under the direction of particular statutes, may also be referred the conveyance of a bankrupt's property made by the commissioners to the assignees under the 13th Eliz. c. 7. 1 Jac. I. c. 15. and the other bankrupt-acts, by which the commissioners are impowered to assign all money, goods, chattels, wares and merchandizes of the bankrupt as well present

(*v*) Comyns's Dig. tit. Distress. (D. 7.)

as

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as future; and by such assignment the property vests in the assignee, so that the bankrupt cannot afterwards recover or release the same; and notwithstanding part of the property assigned consists of *choses in action*, yet the assignee may sue for and recover the same in his own name (*u*).

(*u*) See the statutes referred to, and *Ex parte* Proudfoot, 1 Atk. 253.—Evans *v.* Mann, Cowp. 569.—Ashley *v.* Kell, 2 Stra. 1207.—and Hunter *v.* Potts, 4 T. R. 182.

CHAPTER

CHAPTER THE FIFTH.

OF THE SUBJECT-MATTER OF THE CONTRACT.

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IT will not fail to occur to the reader that much of the matter which would seem properly referable to this title has been discussed in other parts of the work; as in the instance of reclaimed animals, ships, &c. But as the generic distinction of such property as subjects of the contract under consideration arises, in the one case from the nature of the vendor's interest, and in the other from the form of the contract, it was thought proper to speak of them under the titles which profess to treat of those branches of the subject which give rise to such distinctions. The same observation will apply in other instances; so that in fact there is little left to be enlarged upon in this chapter, where the thing sold is such as may legally be made the object of a sale. The present chapter will therefore be devoted to the consideration of those cases in which sales are considered illegal, with respect to the subject-matter.—This branch of our subject may be divided as follows: where the contract is

1st Contrary to sound policy.

2d Contrary to the principles of morality.

3d In contravention of those statutes made for the regulation of particular trades.

And here it may be observed, that by the law of England many contracts are adjudged illegal, though not specifically so declared by any positive law; as in the two first divisions of this chapter; all contracts being void if made against

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against the principles of sound policy, or the principles of morality, for the law prohibits every thing which is *contra bonos mores* (*a*).

SECT. I.

Of Sales contrary to Public Policy.

THE first subject which will be considered in this section is that of buying and selling the current coin of the country for more than its denomination.—Whether such contracts be or be not, contrary to public policy it is not our business here to examine; it is sufficient for us to say, that they have been so considered by parliament, and declared to be, "to the great hinderance of the "commonwealth of this realm (*b*)," and it was there- "fore enacted, "That if any person or persons exchange "any coined gold, coined silver or money, giving, receiv- "ing, or paying any more in value, benefit, profit, or ad- "vantage for it, than the same is or shall be declared "by the King's Majesty's proclamation to be current "for within this his Highness's realm and other his do- "minions, that then all the said coined gold, silver, and "money so exchanged, and every part and parcel there- "of shall be forfeited, and the parties so offending shall "suffer imprisonment by the space of one whole year, "and make fine at the King's pleasure." *

(*a*) *Per* Lord Mansfield in Jones v. Randall, Cowp. 39.

(*b*) 5 and 6 Edw. 6. c. 19.

* I am not aware of any decision upon this statute: it is however likely to be soon brought under review in the case of one De Young, who has been tried and convicted upon it. The case stands for argument in the Exchequer Chamber upon an objection taken in arrest of judgment. See Supp. p. 318.

It

It is also contrary to the policy of our laws to give effect to any contract whose object is to forestall the market, regrate, or ingross the article bought. Forestalling the market is defined by the statute 5 and 6 Edw. VI. c. 14. to be the buying or contracting for any merchandize or victual coming in the way to market: or dissuading other persons from bringing their goods or provisions there; or persuading them to inhance the price, when there.—Spreading rumours with intent to inhance the price of any article, &c. (*c*).—Regrating is said to be the buying of corn or other dead victual, in any market, and selling it again in the same market, or within four miles of the same place; and ingrossing is the getting into one's possession, or buying up large quantities of corn or other dead victuals, with intent to sell them again.—These acts are illegal at common law (*d*). And therefore where goods are bought or contracted to be bought for any of the purposes aforesaid, the contract is illegal and void, and no action can be supported for the non-performance of it. But though it is said in Hadham's case (*e*), that it is unlawful to sell corn *in the sheaf;* and in a marginal note to that part of the institute, that, "he is an ingrosser that buys (other than by grant or "lease of land or title) any corn growing in the fields;" Yet it would seem, that the purchase of a *standing crop* is not considered illegal, unless it appear to have been made with the design of selling it again (*f*).

The next class of contracts which will be considered under this head, are such as originate in bribery at elections for members of parliament.

(*c*) Rex *v.* Waddington, 1 East. 142.

(*d*) 1 Hawk. P. C. c. 80.—Rex *v.* Maynard, Cro. Car. 232.—3 Inst. 195.—Rex *v.* Waddington, *supra*.—And Rex *v.* same, 1 East. 167.

(*e*) 3 Inst. 197.

(*f*) *Per* Mansfield, C. J. in Bristow *v.* Waddington, 2 Bos. and Pull, N. R. 359.

As

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As it is of the utmost importance that the source of that stream of democratic influence which the constitution designed to temper the ardent beams of monarchical power, and fertilize those flowers of liberty which are Britons' proudest boast, should be kept pure and unpolluted, it has ever been the object of the legislature to endeavour, under the severest penalties, to exclude any possibility of undue influence from the minds of those who exercise the important privilege of electing representatives in parliament; that such endeavours have hitherto been unavailing, is but too true; and it is much to be feared that the bulk of mankind will still continue to disregard their real, though more remote interest, when opposed to the present profit which corruption will ever hold out to them.

That branch of those legislative regulations alluded to, which more immediately relates to the subject in hand, is the statute 7 and 8 W. III. c. 4. by which it is enacted, that "no person &c. after the teste of the writ "&c. shall before his election, directly, or indirectly, "give, present, or allow to any person or persons hav- "ing voice or vote in such election, any money, meat, "drink, entertainment, or provision, or make any pre- "sent, gift, reward or entertainment, or shall at any "time hereafter make any promise, agreement, obliga- "tion, or engagement, to give or allow any money, "meat, drink, provision, present, reward, or entertain- "ment to or for any such person or persons in particu- "lar, or to any such county, city &c. or to or for the "use, &c. of any such person, place, &c. *in order* "to be elected to serve in parliament for such county, "city, &c."

This statute therefore prohibiting a candidate from furnishing the voters with any provisions after the teste of "the

the writ, any contract with a person to do that which the act forbids is illegal, and no action can be maintained for the breach of it, as if an innkeeper at the request of the candidate, furnish the voters with refreshment; he cannot recover of the candidate; as appears by the following case.

The plaintiff was an innkeeper (*g*), and the defendants two of the candidates for the borough of Ipswich. The action was brought on a bill for provisions furnished to the voters of the borough, at the request of the defendants, consisting of three descriptions of charges; viz. 1st For provisions furnished before the *teste* of the writ; 2dly For provisions furnished after the *teste* of the writ, to voters resident in the borough; 3dly For provisions furnished to voters not resident in the borough.—The defendants paid into court sufficient to cover the charges of the first and last descriptions: the question then was, if the plaintiff could recover the charges of the second description, notwithstanding the 7 and 8 W. III? On the part of the plaintiff it was contended, that the words "*in order*" used at the end of the clause must be construed to run through the whole clause, and that it did not appear that the provisions were furnished to the voters *in order* that the defendants might be elected. But the court held, that the words "*in order, &c.*" related only to the latter part of the clause. And upon the principal question, EYRE, C. J. said, "It seems to be the "opinion of the whole court, that if the defendants "think proper to insist on their objection, they may do it "with success, This action is apparently founded on a "contract to disobey the law, being to provide enter- "tainment for voters during an election."—"Then how

(*g*) Ribbans *v.* Crickett and another, 1 Bos. and Pull 264.

"shall

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" shall an action be maintained on that which is a direct " violation of the public law? The contract is bottomed " in *malum prohibitum*, of a very serious nature in the " opinion of the legislature, as appears by the preamble " of 7 and 8 W. III. c. 4; how then can we enforce a " contract to do that very thing which is so much re- " probated by the act? I am perfectly aware of the " difficulties that may arise from construing this act " rigidly; but perhaps still greater will arise if it be not " so construed. It is true that a voter who comes from " a distance, may have reason to complain if he is not " provided with necessaries; but it is also obvious that " if the candidate can supply him, he may supply him- " self. If any exception is to be allowed for voters not " resident, the whole mischief complained of in the " act will necessarily follow. It will be impossible for " the candidate to make a distinction between those " voters who reside at a distance, and those who live " within half a mile of the place of voting. The legis- " lature has drawn a strict line which is not to be de- " parted from: it says, that after the teste of the writ, " no meat or drink shall be given to the voters by the " candidate; and that being the case, this court cannot " give any assistance to the plaintiff consistently with " the principles which have governed the courts of jus- " tice at all times, and with the cases which have been " this day cited (*h*). Persons who engage in these kind " of transactions must not bring their case before a court " of law."

(*h*) Faikney *v.* Reynons, 4 Burr. 2069.—Petrie *v.* Hannay, 3 T. R. 418.—Steers *v.* Lashley, 6 T. R. 61.—Booth *v.* Hodgson, 6 T. R. 405.—and Mitchell *v.* Cockburn, 1 H. Bl. 379, which establish the principle, that a demand arising out of an illegal transaction cannot be supported; to which may be added, Lightfoot *v.* Tenant, 1 Bos. and Pull. 551.

In

In a subsequent case (*i*), where an action was brought for meat, drink, &c. supplied by the plaintiff's testator, a publican, to *non-resident* voters at the election of members of parliament for the city of Durham, by the desire of the defendant, who was one of the candidates; it was objected that this demand came within the treating act (7 and 8 W. III.) A distinction was endeavoured to be drawn between *resident* and *non-resident* voters which was over-ruled; and upon the authority of the preceding case, which was fully recognized, the plaintiff was nonsuited.

So the publication of a libel being an offence against the public peace, its tendency being to provoke the anger and resentment of the person libelled, by holding up to the hatred, contempt, or ridicule of the public (*k*); it is contrary to sound policy to give effect to contracts for the sale of such mischievous productions; accordingly it has been ruled, in a case which will be noticed in the next section (*l*), that no action lies for the value of prints and caricatures of a libellous nature.

It seems properly to belong to this section to notice the regulation of the 24 G. II. c. 40. respecting the sale of liquors in quantities under the value of twenty shillings, the act being in its nature, a declaration that it is contrary to sound policy to afford the lower orders the means of obtaining credit for small quantities of liquor, which is a great encouragement to drunkenness and riot: the 12 § of that statute therefore enacts, "That "no person or persons whatsoever shall be entitled unto or "maintain any cause, action, or suit for, or recover either "in law or equity any sum or sums of money, debt or de-

(*i*) Lofthouse, executor, &c. *v.* Wharton, cited in 1 Campbell, N. P. C. 550.

(*k*) 1 Hawk, P. C. 193.

(*l*) Fores *v.* Johnes.

"mands

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" mands whatsoever for or on account of any spirituous " liquors, unless such debt shall have been, and *bonâ* " *fide* contracted at one time to the amount of twenty " shillings or upwards: nor shall any particular article " or item in any account or demand for distilled spiritu- " ous liquors be allowed or maintained, where the li- " quors delivered at any one time, and mentioned in " such article or item shall not amount to the full value " twenty shillings at the least, and that without fraud or " covin."

But this act only applies where the liquors are sold to the consumer: and therefore where in an action for use and occupation of part of a house, and for goods sold and delivered (*m*), it appeared that the plaintiff was a liquor-merchant, and that the defendant occupied one side of a house belonging to him, the other side being occupied by one Eaton, who sold liquors on the account of the plaintiff. The defendant kept an eating-house, and the liquors consumed by the customers there, were had from Eaton, as they were wanted. Many of the items in the bill for liquors were under twenty shillings. It was objected, that the act of parliament prevented the plaintiff from recovering for those items; but Lord Kenyon, before whom the cause was tried, ruled otherwise; and he said, that he thought this case did not fall within the mischiefs intended to be remedied by this act of parliament, the intent of which was to prohibit the sale of such small quantities to the consumer to prevent the pernicious effects of dram-drinking, which had been found extremely injurious to the lower orders of society. In the present case, the liquors were not sold to the defendant for his own consumption, but for the use of the guests

(*m*) Jackson *v.* Attrill, Peake's N. P. C. 180. a.

resorting

resorting to his house in the way of his trade, and therefore in his Lordship's opinion, not within the act of parliament. But his Lordship said he would take a note of the objection, and the defendant might move the court, if he thought proper. The reporter adds, that he believes the defendant did not move the court.

SECT. II.

Of Contracts of Sale contrary to the Principles of Morality.

THE law of England, it has been already said, prohibits every thing which is *contra bonos mores*; and therefore no contract which originates in an act contrary to the pure principles of morality can be made the subject of complaint in the courts of justice: this will be seen from the case alluded to in the last section (*n*).

Assumpsit for goods sold and delivered. The plaintiff was a printseller in Piccadilly, and the action was brought to recover the value of a quantity of caricature prints, sold by him to the defendant.

The order, as proved to have been given by the defendant to the plaintiff, was, "For *all* the caricature "prints that had ever been published." Under this order the prints in question had been sent to the defendant's house in Wales.—The defendant refused to receive them, on the ground that the collection contained several prints of *obscene and immoral subjects*, exclusive of several being duplicates. The plaintiff's counsel contended, that the order was general and comprehensive, without any exception as to the subject, and that the plaintiff therefore having sent prints of every description

(*n*) Fores *v.* Johnes Esq. 4 Esp. N. P. C. 97.

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was entitled to be paid for them. Mr. Justice Lawrence, who tried the cause, said, that for prints, whose objects are general satire or ridicule of prevailing fashions or manners, he thought the plaintiff might recover; but he could not permit him to do so for such whose tendency was immoral or obscene; nor for such as were libels on individuals, and for which the plaintiff might have been criminally answerable. The cause was referred.

So if articles of dress be sold to a woman of the town, for the purpose of enabling her to appear at public places, and with a view to payment out of the wages of her prostitution; the vendor cannot recover, for the maxim *ex turpi causâ non oritur actio* applies; but it is otherwise if the goods are not supplied with that view; for then the vendor may recover the price, although he knew the way of life of the vendee; thus

In assumpsit to recover the value of certain clothes (*o*) furnished by the plaintiff to the defendant; the defence was, that the defendant was a woman of the town; and that this was well known to the plaintiff, *and that the clothes in question were for the purpose of enabling the defendant to carry on her business of prostitution.* The evidence to bring home a knowledge of the defendant's way of life to the plaintiff, was very slight: and Lord Ellenborough said, it must not only be shewn that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold her the clothes to enable her to carry it on; so that he might appear to have done something in furtherance of it. In that case the contract was corrupt and illegal, and such as could not be enforced in a court of justice;

(*o*) Bowry *v.* Bennet, spinster, 1 Campb N. P. C. 348.

but

but it was not to be considered of this description from the mere circumstance of the defendant being a prostitute, even within the plaintiff's knowledge. CHAP. V.

This distinction between acts *in furtherance* of the immorality, and the mere *knowledge* of it, will be further illustrated by the following cases.

Assumpsit for the use and occupation of certain rooms belonging to the plaintiff (*p*). It was proved that the defendant was a woman of the town; that the rooms had been let to her by the wife of the plaintiff, who it was proved, managed the business of his house in letting the lodgings; that at the time of letting them, she was informed of the defendant's mode of life, and consented that she should be at liberty to receive male visitors, for the purpose of prostitution. It was ruled that this action was not maintainable, and a verdict was found for the defendant.

So where an action was brought against the defendant (*q*) for board and lodging, and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff, who kept a house of bad fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution. Lord Kenyon, C. J. was of opinion, that such a demand could not be heard of in a court of justice.

On the other hand, where, in an action to recover the amount of a bill for washing done for the defendant (*r*); it appeared that the articles washed consisted princi-

(*p*) Girardy *v.* Richardson, 1 Esp. N. P. C. 13.

(*q*) Howard *v.* Hodges, Middlesex Sittings before Lord Kenyon, C. J. 2d of December 1796. Selw. N. P. 79.

(*r*) Lloyd *v.* Johnson, 1 Bos. and Pull. 340.

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pally of expensive dresses; and that there were also some gentlemen's night caps; the former of which a witness (the defendant's servant) swore, were for the purpose of enabling the defendant to appear at public places, and that the latter were worn by those persons who slept with her mistress. It was also proved, that the plaintiff had full knowledge of the defendant's situation, and of the purposes to which the articles in question were applied. A verdict having been found for the plaintiff; it was moved to set it aside, and enter a nonsuit, and Crisp *v.* Churchill, E. 34. G. III. *coram*, Eyre, C. J. was cited, where in an action for use and occupation of a lodging, it was set up that the defendant was an infant and a prostitute, the Chief Justice was of opinion that those circumstances were no bar to the action, as both an infant and a prostitute must have a lodging; but it being shewn that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact, he held that the action was not maintainable. But nothing was taken by the motion; the court holding that the plaintiff being employed generally to wash the defendant's linen, the use which the defendant made of it could not affect the contract.

It is unnecessary to multiply instances of contracts which have been held illegal on account of the taint of immorality. The cases which have been cited are sufficient to illustrate the general principle.

SECT III.

Of Sales in Contravention of particular Statutes.

IT is not proposed here to give a detailed account of the various cases in which the legislature has interfered to regulate the manufacture or sale of particular articles; such

such an enumeration would be quite unnecessary: it is sufficient for our present purpose to remark, that whenever any statute positively forbids the sale or manufacture of any article, except in the manner prescribed, or if it is apparent from the whole scope of the statute, that such is the intention of it; no action can be maintained upon any contract for the sale of such article, unless the requisites of the statute have been complied with. The following case is an example of this rule.

By the statute 17 G. III. c. 42. § 1. reciting, "that "inconveniences had arisen to the public by frauds committed in lessening the size of bricks under their usual "proportion, without any diminution of price: for remedy thereof, and for the common good and benefit "of the subject," it was enacted, "that all bricks which "shall be made or burnt for sale, in any part of England, shall, when burnt, be not less than eight inches "and a half long, and not less than two inches and a "half thick, and not less than four inches wide." And the 2 § gives a penalty of twenty shillings *per* thousand for breach of this regulation.

In an action for goods sold and delivered (*s*) to recover the value of between five and six thousand bricks, which the defendant had bought from the plaintiff, a brickmaker; it appeared in evidence, that the bricks in question had been seen by the plaintiff, and selected by him out of a larger quantity, some of which had been rejected by him for other defects, but no notice had been taken of the size, and the bricks were afterwards received and used by the defendant. But Lord Ellenborough, C. J. being of opinion, that the making and selling of such bricks was a fraud upon the statute, non-

(*s*) Law *v.* Hodgson, 11 East. 300.—2 Camp. N. P. C. 147. S. C.

suited

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suited the plaintiff. It was moved to set aside the nonsuit, on the ground, that however the breach of this law might have been a reason for the defendant's rescinding the contract, and returning the bricks when he discovered them to be under the statutable dimensions, yet having accepted and actually converted them to his own use, the contract was executed, and the vendee was at all events liable to pay the actual value of the goods; that the legislature had not avoided the contract itself, but only subjected the brickmaker to a penalty. But the court held that this was a fraud upon the buyer, which it was the policy of the act to protect him against; which could only be done by holding that the seller should not recover the value of the bricks so sold. And Grose, J. said, the legislature has prohibited the general sale of bricks which are under size.—Rule refused.

So by the game laws, 5 Ann c. 14. and 28 G. II. c. 12. the sale of game is considered an offence, and punishable by severe penalties. By the former of these statutes (which is made perpetual by 9 Ann. c. 25): "Every higler, chapman, carrier, innkeeper, victualler, "or alehouse keeper, who shall have in his custody or "possession any hare, pheasant, partridge, moor, heath-"game or grouse, or shall *buy, sell, or offer to sale*, any "hare, &c. unless such game in the hands of such "carrier be sent up by a person qualified to kill the "game, shall, upon every such offence be carried before "one justice of peace for the county, city, &c. where "the offence is committed, and being convicted upon "view, or upon the oath of one or more credible wit-"nesses, shall forfeit for every hare, &c. the sum of five "pounds, &c." And by the 28 G. II. c. 12.; "Persons "qualified or not qualified, *selling*, *exposing*, or offering to "sale, any hare, pheasant, partridge, moor, heath-game or grouse,

" grouse, are for every such offence made liable to the " same forfeitures and penalties as are inflicted by the " statute of Ann upon higlers, &c."—It being obviously the intention of the legislature, by these acts to prevent the sale of game by any person, it follows that if persons contract for the sale or purchase of game in the face of the law, such contract cannot be enforced by a court of justice.

But it would seem that it is no objection to the validity of a sale, that it is made contrary to an act of parliament, containing mere revenue regulations, which are protected by a specific penalty.

By statute 29 G. III. c. 68. for granting the duties on tobacco, it is enacted (*t*), " That every person who shall " deal in tobacco, shall, before he shall deal therein, " take out a licence;" which, by the 72 §, is to be renewed yearly, under a penalty of fifty pounds. The statute 30 G. III. c. 40. enacts, that no tobacco (except Spanish or Portuguese) shall be imported either wholly or in part manufactured, on pain of forfeiting all such tobacco, with the packages, and also the ship in which it was imported. And by stat. 43 G. III. c. 134, § 5. prize tobacco is made subject to the regulations and forfeitures of the former acts. Upon these acts a question was raised; whether a sale of a parcel of prize manufactured tobacco, consigned by persons in Guernsey to their factor here, and regularly entered on importation, and afterwards sold by such factor, he not having entered himself at the excise office as a dealer in tobacco, nor having taken out a licence, was legal? Upon which the court held, that, there being no clause in the acts making the contract of sale illegal; and it being at most, but a breach

(*t*) § 70.

of

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of a mere revenue regulation, which was protected by a specific penalty, they were satisfied that no objection lay to an action for the recovery of the price of such tobacco (*u*).

Having thus shortly noticed the principal causes which render the contract of sale illegal, we will conclude this chapter with the observation of Lord Mansfield on the subject of illegal and immoral contracts.

"The objection" (says that noble and learned Lord (*x*)) "that a contract is immoral or illegal, as between plaintiff "and defendant, sounds at all times very ill in the mouth of "the defendant. It is not for his sake, however, that "the objection is ever allowed; but it is founded in ge- "neral principles of policy, which the defendant has the "advantage of, contrary to the real justice, as between "him and the plaintiff, by accident, if I may so say. "The principle of public policy is this: *ex dolo malo* "*non oritur actio.* No court will lend its aid to a man "who founds his cause of action upon an immoral or an "illegal act. If from the plaintiff's own stating or "otherwise, the cause of action appears to arise *ex turpi* "*causâ, or the transgression of a positive law* of this "country, there the court says he has no right to be "assisted. It is upon that ground the court goes; not "for the sake of the defendant, but because they will "not lend their aid to such a plaintiff. So if the plaintiff "and defendant were to change sides, and the defendant "was to bring his action against the plaintiff, the latter "would then have the advantage of it; for where both "are equally in fault, *potiar est conditio defendentis.*"

(*u*) Johnson and others *v.* Hudson, 11 East. 182.

(*x*) In Holman *v.* Johnson, Cowp. 343.

CHAPTER

CHAPTER THE SIXTH.

OF WARRANTIES.

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BY the civil law (*a*) an implied warranty was annexed to every sale, in respect to the title of the vendor; and if goods sold by a person who had no title to them, were taken from the vendee, and redelivered to the proprietor by the sentence of the judge, which judicial recovery of that which another had acquired by purchase was called eviction, the vendee had his remedy on the warranty. But with us, we may remember, a man may, in certain cases, acquire a property by purchasing from a person who had none; in which case the owner of the goods cannot recover them of the vendee, but is left to his remedy against the fraudulent vendor. But in any case where the vendee suffers by the insufficiency of his vendor's title (when he has sold the goods *as his own*) he may recover a satisfaction from the vendor, though there may not have been any express warrantry (*b*); and that though it do not appear that the price has been paid (*c*), or that the real owner has retaken his goods, or that the vendee has suffered any actual damage; for the fraudulent representation by the vendor, that the goods were his own, when he knew them to be the property of a stranger, is the cause of action (*d*)*; and therefore when

(*a*) Ff. lib. 21. tit. 2. 1.

(*b*) 1 Roll's Abg. 90. tit. Action sur Case, (P.) 5.-Cross *v.* Gardner, 1 Show. 68.—3 Mod. 261.—Carth. 90. S. C.

(*c*) 9 H. 7. 21. b.

(*d*) Furnis *v.* Leicester, Cro. Jac. 474.

* In the case of Medina *v.* Stoughton, Salk. 210, there is a dictum of Holt, Ch. J. that where the seller of a personal chattel is *out of possession,*

CHAP. VI. when the vendor has not affirmed the goods to be his, nor expressly warranted them, the vendee is without remedy, for the common law will not imply a warranty; and in such case the maxim is *caveat emptor* (*e*). So also as to the goodness of the article sold; the vendor is not bound to answer, unless he expressly warrant it to be sound and good (*f*), or unless he *knew* it to be otherwise, and had used any art to disguise the defect (*g*); or it turn out to be different from what the vendor represented it to be, upon the faith of which representation it was bought by the vendee (*h*). But in all cases of warranty by law, it is absolutely necessary to aver and prove that the vendor *knew* of the defect, the deceit being the gist of the action (*i*).

But though the vendor is not bound to answer for the goodness of the articles sold, except in the cases mentioned, yet if they be of a different quality from that ordered by the vendee, it is open to him to return the goods and rescind the contract (*k*). And in this our law corresponds with the civil law (which considered any fraud

(*e*) Co. Lit. 102. a.—Noy's Max. c. 42.

(*f*) 1 Roll. Abg. p. 90. Action sur case, (P.) 4.

(*g*) Ibid. (P.) 3.—Kitch. 174. a.—Chandelor *v.* Lopus, Cro. Jac. 4.—Mellish *v.* Motteux, Peake's N. P. C. 115. 3 Camp. 154

(*h*) *Per* Poph. in Andrew *v.* Boughey, Dyer. 75.—Southern *v.* How, Cro. Jac. 469.—Roll. Abg. 91. tit. Action sur case, (P.) 7, 8.

(*i*) Dale's case, Cro. Eliz. 44.—Chandelor *v.* Lopus, *supra*.—Springwell *v.* Allen, Aleyn. 91, and 2 East 448. n. S. C.—Dowding *v.* Mortimer, 2 East 450. n.

(*k*) Fisher *v.* Samuda, 1 Camp. N. P. C. 193.

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possession, the bare affirmation that it is his, is not sufficient to charge him without an express warranty, for the mere circumstance of his being out of possession affords reason to suspect his title. But this distinction is not mentioned in the report of this case in Lord Raym. 593. And see the observation of Buller, J. upon it in Pasley *v.* Freeman, 3 T. R. 57.

or

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or deceit, or any latent imperfection, sufficient to avoid the contract (*l*); but in such cases the vendee must return, or offer to return, the goods to the vendor immediately upon discovering that they do not answer the order; for otherwise he may be presumed to assent to their being of a good quality, and to acquiesce in the due performance of the contract on the part of the vendor (*m*). But see 7 Ves. 247.

In all cases of express warranty, an action on the case, or assumpsit (*n*), lies against the vendor, if the warranty prove false; as if a man sell cloth and warrant it to be of a particular length (*o*); that a horse is sound (*p*); or wool merchantable (*q*); when the cloth is not of the length represented, the horse ~~blind~~ unsound, or the wool ~~full of moths~~ unmerchantable; in all these cases an action lies; and that though the warranty be by parol (*r*), if the warranty be made upon the sale; but if it be made after the sale it must be in writing, otherwise the vendee can have no action on the warranty (*s*); for if not made *upon the sale*, there is no *consideration* for a parol agreement; but where it is in writing the consideration is not inquireable (*t*). Yet if a man warrant a horse to be sound, before sale, upon which another buys him, an action lies; for the warranty was the cause of the buying (*u*); and so it seems if the warranty be before the price is paid (*x*).

(*l*) Fulbeck's Par. dial. 3. p. 14.

(*m*) Fisher *v.* Samuda, *ante*.

(*n*) *Per* Grose, J. in Pasley *v.* Freeman, 3 T. R. 54.

(*o*) F. N. B. 98. K.

(*p*) 1 Roll's Abg. 96, (Z. l. 20.) 97. (Z. l. 12.)

(*q*) Ibid. l. 40.

(*r*) F. N. B. 98. K.

(*s*) Ibid, and see Linsey *v.* Selby, 2 Lord Raym. 1120. and the opinion of Pratt, C. J. in an anonymous case, 1 Stra. 414.—Andrew *v.* Boughey, Dyer 76. a.—Roswell *v.* Vaughan, Cro. Jac. 197.—Pope *v.* Lewyns, ibid 630.

(*t*) Plowd. 308. b. 309. a.

(*u*) Goldsmith *v.* Preston, 1 Roll. Abg. 96. l. 5.

(*x*) Butterfield *v.* Burroughs, 1 Salk. 211.

But

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But a warranty does not bind where it is apparently false, or the falsehood is known to the vendee; as if a man warrant a horse apparently blind to be sound (*y*); or cloth that is murrey to be blue, and the vendee see it (*z*); for in such case, if he be deceived, it is his own fault, and the law will not give any remedy to a man for his own negligence (*a*). This distinction of nude warranties (as they are called in some of the books) bears a strong resemblance to the rule of the Roman law, which distinguished between a defect *latens* and *patens*; in the former case the vendor was answerable upon the implied warranty which that law annexed to every sale; but if the defect was plain and visible the vendee bought it at his peril (*b*). And this rule was recognized by the present learned Master of the Rolls, in the case of Dyer *v.* Hargrave (*c*), where it is laid down, that a warranty is not binding where the defect is obvious: and his honor exemplified this rule by the case of a horse with a visible defect, or a house without a roof or windows, the one warranted sound, and the other in perfect repair.

It seems that the mere affirmation of a matter of opinion at the time of the sale of any article, as inserting the name of an artist in a catalogue, as the painter of any particular picture, is not such a warranty as will subject the seller to an action, if it turn out he was mistaken (*d*).

But a sale of goods by sample is such a warranty, that if the bulk do not accord with the sample, the purchaser is not bound to accept or pay for the goods on any

(*y*) Ibid.—Kit. 174. a.

(*z*) 11 Edw. 4. 6. b.—Kitch. 174. b.

(*a*) Bayley *v.* Merrel, Cro. Jac. 387.—3 Buls. 94. S. C.

(*b*) Ff. lib. 18. tit. 1, 43, 45.

(*c*) 10 Vesey junr. 507, and see Mellish *v.* Motteux, *ante* 282.

(*d*) Jendwine *v.* Slade, 1 Esp. N. P. C. 572.

terms;

terms; although no fraud was intended on the part of the vendor, and although there may exist a customary arrangement in a particular trade, under such circumstances; as where the defendant (*e*) purchased of the plaintiff by sample, at a public sale, sixteen hogsheads of sugar; but on examining the sugars purchased, it was found that they by no means corresponded in colour with the samples, and, in the opinion of the brokers who saw them, they were less valuable by five or six shillings a hundred weight. The plaintiff nevertheless required that the defendant should take the sugars, on being allowed a compensation for the inferiority, insisting that according to the usage of the trade, where samples have been drawn without fraud, and the bulk proves inferior, sworn brokers are to be called in to estimate the difference, and the vendor making an allowance the purchaser must stand to the bargain. The defendant refused to accede to this, as he alleged that the sugars were unfit for the purpose for which he had bought them. It appeared that the sugars in question arrived in the West India Dock in the end of November 1806, and that in pursuance of the dock act, as they were landed samples were taken, which were the samples exhibited at the sale on the 9th of April following. From being exposed to the air during this long interval, they had become much whiter than when originally taken, or than fresh samples drawn on the 11th of April. It was proved that the sample and the bulk were of equal grain, and likely to contain the same quantity of saccarine matter, so that at the time of the sale they would have been of equal value to the sugar baker, but that for retail much more depends upon the colour than the quality. The act of parliament enables the importer

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(*e*) Hibbert *v.* Shee, 1 Campb. N. P. C. 113

of

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of sugars at any time to obtain fresh samples, while the purchaser at a public sale has no means of knowing when the samples exhibited have been drawn. Lord ELLENBOROUGH. The question here is, whether the contract has been substantially performed: does the sugar accord with the sample exhibited at the sale? If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of compensation for the dissimilarity. This is not a performance of the contract. And though there should prevail a habitual mode of arrangement between dealers in the article, I have always a right to say, "is this what I meant to purchase?" A spirit of candour and accommodation may lead to a compromise between the parties; but the legal mode of dealing is, that if an article agreed upon is not furnished, I may reject it, and keep my money in my pocket. It appears that with respect to sugars, there will be a difference between the bulk and the sample, when the sample has been for some time exposed to the air; and if the party had full notice *when* the sample was drawn, he might be expected to calculate upon the difference; but all that is communicated at these sales is, that the sugars of which samples are produced lie in the Docks, and the bidders have a right to presume that the samples have been recently drawn.

But if under these circumstances the sugars had been delivered and the money paid, no action could have been maintained to recover back the price; but the vendee must have sued upon the warranty that the bulk was equal to the sample (*f*). And where a person purchases any article at a certain price, upon the faith of a specimen exhibited, and on delivery it is found to be

(*f*) Fortune v. Lingham, 2 Campb. N. P. C. 416.

inferior

inferior, the vendee cannot, in an action for the price, set up the inferiority of the article delivered as a defence; but he should return it, and rescind the contract (*g*).

Upon a sale of goods by sample, with a warranty that the bulk of the commodity answers such sample, the law does not raise an implied warranty that the commodity is merchantable, though a fair merchantable price be given: and therefore if there be a latent defect then existing, unknown to the seller, and without fraud on his part, such seller is not answerable, though the goods turn out to be unmerchantable (*h*).

As in the remaining part of this chapter, we shall frequently have to consider the law of warranty as applied to horses, it seems proper here to notice a very prevailing misconception as to warranties of this particular species of property. It was formerly the opinion that a sound price given for a horse was tantamount to a warranty of soundness; but when that came to be sifted, it was found to be so loose and unsatisfactory a ground of decision that Lord Mansfield rejected it, and said there must either be an express warranty of soundness, or fraud in the seller in order to maintain an action (*i*); but notwithstanding this decision of the noble and learned judge, many persons still purchase without warranty, relying on the old rule.

If a horse be sold with a warranty of soundness, and it turn out that the warranty is false, the vendee may return him and rescind the contract (*j*); and in such case he will be entitled to recover back the price; or he may, if he please, keep the horse and bring an action on the

(*g*) Grimaldi *v.* White, 4 Esp. N. P. C. 95.

(*h*) Parkinson *v.* Lee, 2 East 314.

(*i*) *Per* Grose, J. in Parkinson *v.* Lee, 2 East 322.

(*j*) Bracton, l. 2. c. 27. Glanvil, l. 10. c. 14.

warranty,

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warranty, in which he will have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty (*k*); but in the former case the contract must be rescinded *in toto*, and the parties put in *statu quo* (*l*), for if the contract remain open, no action will lie to recover back the price, but the plaintiff must sue on the warranty (*m*); and therefore where, in an action for money had and received, to recover back the price of a horse, which had been warranted (*n*) sound by the defendant, it appeared that there was an express warranty of soundness on the original sale, and that shortly after the bargain had been made and the price paid, the plaintiff objected that the horse was a roarer and unsound, and tendered back the horse, and demanded the money: the defendant admitted that he had made the warranty, but denied the unsoundness, and refused to take back the horse or return the money; but said that *if the horse were unsound, he would take it again, and return the money.* It was proved that the horse was unsound, but it was objected on the part of the defendant, that the action was misconceived, for that the question to be tried was the warranty, which could only be tried in a special action on the case. At the trial it occurred to the learned Ch. J. who tried the cause, that the defendant by his promise to return the money and take back the horse if he were unsound, had placed himself in the situation of a stakeholder, and therefore that on proof that the horse was unsound, he was to be considered as holding the money for the use of the plaintiff. But in delivering the opinion of the court, on

See post. 296.

(*k*) *Per* Lord Eldon, C. J. in Curtis *v.* Hannay, 3 Esp. N. P. C. 83.

(*l*) *Per* Lord Ellenborough in Hunt *v.* Silk, 5 East 452.

(*m*) Power *v.* Wells, Cowp. 818. Weston *v.* Downes, Dougl. 23.

(*n*) Payne *v.* Whale, 7 East 274.

a motion

a motion for setting aside a verdict which had been found for the plaintiff, and entering a nonsuit, his lordship said, that upon further consideration he was clearly satisfied that the promise did not discharge the original warranty, and that the party complaining of the breach of that warranty must still sue upon it. The second conversation was not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted upon; but rather as a declaration that if the warranty were shewn to be broken, he would do that which is usually done in such cases, take back the horse and repay the money. Then when any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action upon the warranty. Nonsuit to be entered.

In order to maintain an action on a warranty it is not necessary, either that the horse should have been returned, or notice of the unsoundness given to the vendor.

Action on the warranty of a mare (*o*), "*that she was sound, quiet, and free from vice and blemish.*"

The plaintiff had bought the mare in question of the defendant at Winnel fair, in March 1787, for thirty guineas, the defendant then warranting her sound, &c. Soon after the sale the plaintiff discovered that she was a roarer, had a thorough pin through the hock, and had a swelled hock from kicking, but he kept her three months after this discovery, during which time he gave her physic, and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, the plaintiff kept her till October 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her

(*o*) Fielder *v.* Starkin, 1 H. Bl. 17.

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way back to the plaintiff's stable the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound *a full twelve-month before her death.* It appeared that the plaintiff and defendant had been often in company together during the interval between the month of March, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstance of her being unsound. A verdict having been found for the plaintiff for the full price of the mare, it was moved to set it aside and enter a non-suit. Upon shewing cause the court discharged the rule, and Lord Loughborough, C. J. said "Where there is "an express warranty, the warrantor undertakes that it "is true at the time of making it. If a horse which is "warranted sound at the time of sale, be proved to have "been *at that time unsound,* it is not necessary that he "should be returned to the seller. No length of time "elapsed after the sale, will alter the nature of a con-"tract originally false. Neither is notice necessary to be "given, Though the not giving notice will be a strong "presumption against the buyer, that the horse at the "time of the sale had not the defect complained of, and "will make the proof on his part much more difficult. "The bargain is complete, and if it is fraudulent on the "part of the seller, he will be liable to the buyer in "damages, *without either a return or notice.* If on "account of a horse warranted sound proving otherwise, "the buyer should sell him again at a loss, an action "might perhaps be maintained against the original "seller to recover the difference of the price." So also where a pair of horses were warranted to be five years old, when in fact they turned out to be only four; it was held that the vendee, not having rescinded the contract within

within a reasonable time, he could only recover damages for the breach of the warranty (*p*).

But where a horse is sold with an express warranty by the seller, that he is sound, free from vice, &c. yet if that warranty be accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase money, *if, on trial,* he shall be found to have any of the defects mentioned in the warranty; the buyer *must return the horse* as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. And in such case the term trial means reasonable trial (*q*).

It is sometimes made a condition of the sale that the horse shall be returned within a limited time if the warranty prove untrue; in such case it is necessary to return the horse within the time, or no action can be maintained on the warranty (*r*): but this condition does not apply to defects not expressly mentioned in it.

Action on the warranty of a horse (*s*). The case was, the horse was sold at a public auction, warranted six years old and sound; and one of the conditions of the sale at the auction was, that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days, otherwise he should be deemed sound. Ten days after the sale, the plaintiff discovered that the horse in question was twelve years old, and then the defendant refused to receive him; and the plaintiff sold him. It was proved that the horse

(*p*) Dr. Compton's case, cited by Buller, J. in Towers *v.* Barrett, 1 T. R. 136.

(*q*) Adam *v.* Richards, 2 H. Bl. 573.

(*r*) Mesnard *v.* Aldridge, 3 Esp. N. P. C. 272.

(*s*) Buchanan *v.* Parnshaw, 2 T. R. 745.

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was twelve years old: but the jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and gave a verdict for the defendant. A rule having been obtained to set aside that verdict, Lord Kenyon, C. J. said, There was no doubt but that the defendant ought to have taken the horse again. The question turns on the meaning of the condition of sale: and his Lordship was of opinion that it must be confined solely to the circumstance of *unsoundness*. And that there was good sense in making such a condition at public sales; because, notwithstanding all the care that can be taken, many accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited. But the circumstance of the age of the horse is not open to the same difficulty. The verdict was therefore against evidence: and the court made the rule absolute.

And such a condition being printed and pasted up under the auctioneer's box where he declares that the conditions are as usual, is sufficient notice to purchasers (*t*).

But it would seem that a non-compliance with a warranty, is no answer to an action for the price of the goods, even if the vendee tendered back the goods, and the vendor refused to accept them; but the vendee is left to his action on the warranty: and therefore where in an action on a banker's check (*u*) for fifteen pounds drawn by the defendant, of which the plaintiff was the holder, the defence was, that the check was given for the price of a horse bought by the defendant of one Dennis for thirteen guineas, under a warranty of soundness, and the difference of one pound seven shillings had

(*t*) Mesnard *v.* Aldridge, 3 Esp. N. P. C. 271.

(*u*) Lewis *v.* Cosgrave, 2 Taunt. 2.

been

been given by Dennis in money; the horse was in fact the plaintiff's horse, and Dennis was employed to sell merely as agent for the plaintiff; the horse was discovered to be clearly unsound; and the defendant having found out who was the real seller, tendered the horse with the sum of one pound seven shillings to the plaintiff, who again sent it back to the defendant; upon which the defendant again sent it and put it into the plaintiff's stable, in his absence, and without his knowledge. Heath, J. who tried the cause, was of opinion that, as the plaintiff had refused to receive back the horse, the contract for the sale was not rescinded, and that the defendant was therefore bound to pay the check, and had his remedy by an action for the deceit; and the jury under this direction found a verdict for the plaintiff. A new trial was afterwards moved for, upon the ground, that, although in an action for money had and received, it would have been necessary to have shewn that the contract was completely rescinded, yet this being an action upon a bill of exchange, upon the failure of the consideration, which was a sound horse, the bill was gone. The court took time to consider their judgment, but the case was finally decided on the ground that, as there was evidence that the plaintiff knew of the unsoundness of the horse, it was clearly a fraud, and as a man cannot recover the price of goods sold by fraud, the rule for a new trial was made absolute; but the court gave no opinion, as to whether a breach of warranty may be set up as a defence in an action for the price of the commodity. There appears, however, to be this distinction between cases of this sort, and those where the price has been paid; that in the latter the vendee either sues upon the warranty, or, the contract being rescinded, to recover back the price—in either case there is but one action: but where the money

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money is not paid, to hold that the breach of warranty is not a defence to an action for the price, is productive of that which the laws abhors,—circuity of action—the vendor recovers the price, only to be returned to the vendee in damages for his breach of contract (*x*): * but, be this as it may, it is quite clear that such a defence is not available, if the defendant were, after the sale, apprized of the fault of the horse, and did not return him, but afterwards by the application of medicines, or otherwise, lessened his value.

Assumpsit for forty-five guineas, the price of a horse sold by the plaintiff to the defendant, who was an officer in the life-guards (*y*): the horse had been warranted; and the defence was, that the warranty was untrue, the horse having defective eyes when sold. It appeared that the defendant had been informed of this defect in the eyes the day after he bought the horse; that he notwithstanding kept him for near seven weeks before he returned him, in the course of which time, suspecting the horse had some defect in his feet, he blistered him; this produced the thrush, and a considerable degree of

(*x*) See the opinion of Lord Kenyon in Gillis *v.* Cormack, cited in 7 East 481.

(*y*) Curtis *v.* Hannay, Bart. 3 Esp. N. P. C. 82.

* The objection to this sort of defence seems to be, that it is a surprize to the defendant, (See what is said by Lawrence, J. in Basten *v.* Butter, 7 East 484.) this objection might perhaps be removed by notice; but at all events it will not apply when the plaintiff sues upon a *quantum valebat*, so that in such an action, noncompliance with warranty is a good defence. Basten *v.* Butter, 7 East 479.* And even on the sale of a horse for a certain price, with warranty, if the defendant have actually paid the worth of the horse, which proves unsound; before action, it seems that the plaintiff cannot recover more. *Per* Lord Kenyon in King *v.* Boston, 7 East 481. n.

Taylor v. Hare, New. 260.

lameness;

lameness: it was, however, only a temporary lameness, and the horse recovered of it; and it was proved that the remedies applied to the leg and foot could not have affected the eyes. On this case being made out, Lord Eldon said, he thought the matter set up by the defendant was no defence to the action. Instead of returning the horse immediately upon discovering his defects, the defendant doctored him: this produced a new disorder, which the horse had not when sold. The question was, would the horse when returned to the seller be diminished in value by this doctoring? If he would, his Lordship said, he thought the defendant should pay the price, and bring his action against the seller for any defect in the warranty existing at the time of the sale.—His Lordship added, if a person keep a warranted article for any length of time after discovering its defects, and when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, he thought the party could have no defence to an action on the price of the article on the ground of non-compliance with the warranty, but must be left to his action on the warranty to recover the difference in the value of the article warranted, and its actual value when sold. And he concluded with saying, that if the jury thought that if any future purchaser were to be told that the horse had been blistered and doctored, it would diminish his value in the estimation of such purchaser, they should find a verdict for the plaintiff; which they accordingly did.

It should be observed, that a horse labouring under a temporary injury, or hurt, such as having picked up a nail, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without

CHAP. VI. without any view to such an injury: nor is a horse, so circumstanced, an unsound horse within the meaning of the warranty (z).

The warranty upon the sale of goods, &c. is usually contained in the receipt given for the price, which may be read in evidence to prove the warranty without an agreement-stamp (a).

(z) Garment v. Barrs, 2 Esp. N. P. C. 673. X

(a) Skrine v. Elmore, 2 Camp. N. P. C. 407.—Brown v. Frye, ib.

A person sells a horse, as of the age stated in a written pedigree, declaring that he knows nothing of the horse, but what he has learnt from the pedigree. This is not a warranty. Dunlop v. Wauch, Peake, 123.

X In an action upon the warranty of a horse, it is not enough to shew that he is a roarer, as this may be merely a bad habit, or proceed from other causes, unconnected with his general health & activity. To prove a breach of warranty, the roaring must be shewn to be symptomatic of disease or infirmity in the particular case. Baffet v. Collis, 2 Camp. 523.

The vendee of a warranted horse, who proves to be unsound, cannot recover the expenses incurred in keeping the horse, unless he offer to return the horse before he brings the action. Caswell v. Coare, 2 Camp. 82 And the Court of C. P. reduced a verdict, in which the keep had been included contrary to the C. J.'s direction. 1 Taunt. 566. And see Dig. 21, 1, 30, 1.

A party sued on a warranty of a horse may call a prior vendor, who sold with a warranty, to prove the animal sound. Briggs v. Crick, 5 Esp. 99.

CHAPTER

CHAPTER THE SEVENTH.

OF RESCINDING CONTRACTS OF SALE.

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FROM the nature of the contract of sale, it is obvious that, when once entered into, it cannot be rescinded by either of the contracting parties without the consent of the other, and to this purpose speaks Glanvil(*a*); after enumerating the different methods of contracting sales, he says, "*Sed in duobus prioribus casibus*" (where part of the goods have been delivered, or part of the price paid) "*nullo modo potest alteruter contrahentium* "*solâ voluntate à contractu resilire, nisi ex aliquâ* "*justâ et rationabili causâ; veluti si inter eos convene-* "*rit, ut liceat alterutri eorum inde se impune retrahere* "*infra certum terminum; tunc enim licet utrique* "*(sicut convenit) infra datum terminum à contractu* "*impune recedere: quippe generaliter verum est, quod* "*conventio legem vincit.*" But though this be the general rule of law, a distinction is found in the old books as to sales bound by *earnest*: in such case the law appears to have been, that, if the buyer repented of his bargain, he was excused from fulfilling it, upon forfeiting to the vendor what he had given by way of earnest: but if the failure in completing the contract was on the part of the vendor, who had received the earnest, he was obliged to make restitution to the vendee twofold(*b*); a rule which is evidently copied from the civil law(*c*). So

(*a*) L. 10. c. 14.
(*b*) Bracton, l. 2. c. 27.
(*c*) Inst. l. 3. tit. 24.

also

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also Glanvil lays down the law, where the vendee makes default; but where the vendor would rescind the contract, he doubts whether he might do so without loss; his words are, "*Ubi vero solæ arrhæ datæ sunt, si emptor à con-* "*tractu recedere voluerit, id ei cum arrharum amissione* "*licebit. Si autem venditor recedere voluerit in tali* "*casu, quæro utrum sine pænâ id facere possit; quod* "*non videtur, quia tunc videretur, in hoc melioris con-* "*ditionis venditor quam emptor: quod si impune id* "*fieri nequit, quam pænam inde præstabit* (*d*)*?*" How this might have been in Glanvil's time, is however not of much consequence to us in the present day, as the distinction between goods bound by earnest and delivery seems to be quite antiquated; and the law now is, that where a sale has been legally contracted, it cannot be rescinded but by the mutual consent of the contracting parties, or by virtue of an agreement in the original contract, impowering one or both of them so to do, on the happening of a certain event, or otherwise; as where the defendant had sold to the plaintiff a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it (*e*), paying three and six-pence *per diem* for the hire of it. The plaintiff had paid the price at the time of the contract, but his wife not approving of the chaise, it was sent back, at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it: the hire of three shillings and six pence *per diem* was tendered at the same time, which the defendant refused, as well as to return the money.—Under these circumstances the court held that the plaintiff was entitled to recover back the price of the chaise; there being a sti-

(*d*) Glanvil l. 10. c. 14. (*e*) Towers *v.* Barrett, 1 T. R. 133.

pulation

pulation in the contract that it was to be returned if not approved of; the moment therefore it was returned, the contract was at end, and the defendant held the money against conscience, and without consideration. As to the defendant refusing to receive the chaise back, Mr. Justice Buller observed, "It is admitted that if "the defendant had actually accepted the chaise, the "action would lie; but it has been contended that he "did not receive it. Then let us see whether there be "not something equivalent to an acceptance? I think "there is from the terms of the contract. There was "nothing more to be done by the defendant; for he "left it in the power of the plaintiff to put an end to "the contract. Here it was not in his option to re-"fuse the chaise when it was offered to him: he was "bound to receive it; and therefore it is the same as if "he had accepted it. The distinction between those "cases where the contract is open, and where it is not "so, is this: if the contract be rescinded, either, as in "this case, by the original terms of the contract, where "no act remains to be done by the defendant himself, "or by a subsequent assent by the defendant, the plain-"tiff is entitled to recover his whole money; and then "an action for money had and received will lie."

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So where some act is to be done by each party under an agreement of sale; and the vendor by neglecting his part, prevents the vendee from carrying the contract into execution: this is a just and reasonable cause for rescinding the contract:—the following case is an authority on this point.

Action for money had and received (*f*). On the 6th of June 1791, the defendant agreed to sell to the plain-

(*f*) Giles and others *v.* Edwards, 7 T. R. 181.

tiffs

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tiffs all his cord-wood, growing at Tredgodoer in Shropshire, at eleven shillings and six pence *per* cord, ready cut; the wood was to be coaled and cleared from off the premises by Michaelmas 1792, and the money was to be paid on the 1st of March 1792. It also appeared that the custom was for the seller to cut off the boughs and trunks and then cord it, and for the buyer to re-cord it, after which it became the property of the buyer. The defendant cut sixty cords, ten of which he corded, and the plaintiffs re-corded half a cord and measured the rest. On the 8th of March 1792 the plaintiffs paid the defendant twenty guineas: but the defendant neglecting to cord the rest of the wood, the plaintiffs brought this action to recover back the twenty guineas.—The court were clearly of opinion, that he was entitled to recover; and Lord Kenyon said, this was an entire contract; and as, by the defendant's default, the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and recover back the money they had paid under it.

So upon a bargain for the sale of goods, if the vendee do not come and pay for them, and take them away in reasonable time after request, the vendor may elect to consider the contract as rescinded and resell the goods (*g*)

But a contract cannot be rescinded by one party for the default of the other, unless both parties can be put in *statu quo:* and therefore where A agreed (*h*) in consideration of ten pounds, to let a house to B, which A was to repair and execute a lease of within ten days, but B was to have immediate possession, and was to execute a counterpart of the lease, and pay the rent. B took pos-

(*g*) Langfort *v.* Tyler, 1 Salk. 113.

(*h*) Hunt *v.* Silk, 5 East 449.

session

session, and paid the ten pounds immediately, but A neglected to execute the lease and make the repairs, beyond the period of ten days: notwithstanding which B still continued in possession; it was held, that B could not, by quitting the house for the default of A, rescind the contract and recover back the ten pounds in an action for money had and received, but could only declare for a breach of the special contract.

It should be observed, that whenever a party seeks to recover back money paid on a contract which has been rescinded, the original contract must be proved, and that it has been abandoned (*i*). And in no case will a party be allowed to recover back money so paid, or to maintain any action in contravention of such agreement, unless the original contract has been completely rescinded (*k*):—thus in an action for the non-delivery of soil or breeze (*l*) according to a contract entered into between the parties, and for which money had been paid by way of earnest, the plaintiff failed on the special count on account of a variance, he then wanted to go into evidence on the count for money had and received, in order to recover back what had been paid by way of earnest. Sir James Mansfield, C. J. said, he apprehended the rule to be; where a party declares upon a special contract, seeking to recover thereon, but fails in his right to do so altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labour done; as in the

(*i*) Walker *v.* Constable, Bos. 1 and Pull, 306.

(*k*) Weston *v.* Downes, Dougl. 23.

(*l*) Cook *v.* Munstone, 1 Bos. and Pull. N. R. 351.

case

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case of a plaintiff suing a defendant as having built a house for him according to agreement; there if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done.—In Payne *v.* Bacomb (*m*) (cited at the bar) his Lordship said, he supposed there was a special agreement by the defendant to pay a share of the expences of the suit in the Exchequer, but that agreement had not been strictly pursued by him, and consequently he recovered for the money actually laid out by him to the defendant's use, on evidence of his connection with the defendant in that suit, and the obligation of the latter to pay. That case therefore proceeded on the ground that there was *no special agreement still subsisting and in force between the plaintiff and defendant* on which the former was entitled to recover. In this case, if the plaintiff were allowed to go into the evidence he offered, it would amount to saying, that there was no evidence of a subsisting special agreement, where in truth there was such evidence.

Assumpsit for an attorney's bill (*n*). The defence was, that the plaintiff had been employed by the defendant under a written agreement, which was produced, and was in these words. "In consideration of Mr. "Harcourt having appointed me his solicitor, and of "the emolument which I shall receive from preparing "his leases, I undertake to conduct such suits as he "shall be concerned in, without any charge, except the "fees and disbursements actually out of pocket," signed by Parker.—Lord Ellenborough said, he was of opi-"nion, that while this agreement subsisted, nothing

(*m*) Dougl. 651.

(*n*) Parker *v.* Harcourt, 5 Esp. N. P. C. 249.

could

could be recovered except the money out of pocket. Each party had distinct and collateral things to perform. If the plaintiff thought that Mr. Harcourt gave part of his business to other attornies, he should have put an end to the agreement by giving notice to the defendant of his intention to do so, but till that was done he were bound by the agreement.

CHAPTER

CHAPTER THE EIGHTH.

OF THE REMEDY FOR THE NON-PERFORMANCE OF THE CONTRACT OF SALE.

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IT is not the object of this chapter to treat at large of the various actions which arise out of the contract of sale; this branch of our subject has been so copiously handled in the many able works on the law of *Nisi Prius* already before the public, and which are in every professional library, that the repetition would only swell this work to an unnecessary length. We will therefore content ourselves with shortly adverting to the most prominent of those cases, which are almost inseparably connected with the subject treated of in the foregoing chapters.

It will be recollected, that when the contract of sale is complete, the parties have mutual remedies, the one for the payment of the price, and the other for the delivery of the thing sold.—In the former case the remedy usually resorted to, is an action of debt, or assumpsit * to recover the price, for goods sold and delivered, or

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* "Every contract importeth in itself an assumption; for when "one doth agree to pay money, or deliver a thing upon considera- "tion, he doth as it were assume and promise to pay and deliver "the same: and therefore when one selleth any goods to another, "and agreeth to deliver them at a day to come, and the other in "consideration thereof agreeth to pay so much money on the de- "livery, or after, in this case he may have an action of debt, or "an action on the case upon the assumption."—Noy's Max. c. 42.—And see the 3d and 4th Resolutions in Slade's case, 4 Rep. 94.

goods

goods bargained and sold, as the case may be. In actions for goods sold and delivered, where the delivery has been to a third person, it frequently becomes a question whether the goods were sold to the vendee as agent for such third person, or to the vendee on his own account, and delivered to the third person, as his agent or servant. And such cases always depend upon a question of fact, to whom the credit was originally given upon the sale. But if the person for whose use the goods are furnished, be liable at all, any promise by a third person to pay for them, whether made before the delivery or after, must be in writing, otherwise it is void under the statute of frauds (*a*): and therefore where a man gave a verbal order in these words; "you must "supply my mother-in-law with bread, and I will see "you paid;" no action lay against him for the bread supplied (*b*). So if a tradesman deliver goods to A, at the request and on the credit of B, who says, before the delivery, "I will be bound for the payment of the money "as far as eight hundred or a thousand pounds;" if it appear that credit was given to A as well as B, the promise is void, not being in writing; such undertaking of B being merely a collateral promise (*c*). But where the goods have in fact been sold to A, and on his credit, though delivered to B, debt or assumpsit for goods sold and delivered may be maintained against A, the delivery to B being in point of law a delivery to the vendee (*d*); though in such cases it is usual to state in the declaration that the goods were delivered to B. It should be

(*a*) 29 Car. 2. c. 3. § 4.

(*b*) Matson *v.* Wharam, 2 T. R. 80—And see Thompson *v.* Bond, 1 Campbell, N P. C. 4.—And Jones *v.* Cooper, Cowp. 227.

(*c*) Anderson *v.* Hayman, 1 H. Bl. 120.

(*d*) Ramsden *v.* Ambrose, 1 Stra. 127.

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observed that where there is a collateral undertaking *in writing* to pay for goods sold to another, such undertaking must be sued upon in a special action of assumpsit, stating the particular circumstances of the promise, and not upon a general *indebitatus assumpsit* for goods sold and delivered to the defendant, or for goods sold to the defendant, and delivered to another at his request, or for goods sold and delivered to another at the defendant's request (*e*). Where there has been no actual delivery of the goods, it is proper to declare for goods bargained and sold only, omitting the delivery (*f*); but if an action be brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and *delivered* (*g*).

Indebitatus assumpsit will not lie on a special agreement while it continues executory, but where executed it raises a sufficient consideration for a general *indebitatus assumpsit* (*h*); and therefore where A agreed to deliver to B (*i*) one hundred bags of hops at a certain price *per cwt.* by a certain time, and A having delivered part within the time, commenced an action for the price of such part. It was held, that as the contract was entire, and could not be split, the action could not be supported until the whole quantity was delivered, or until the time for delivering the whole arrived. In such cases where there has a special agreement which is not performed, as

(*e*) Mr. Serjeant Williams' note upon Forth *v.* Stanton, 1 Saund. 211. a. b. n. 2.—and the cases there cited.

(*f*) Chaplin *v.* Rogers, 1 East 194.

(*g*) *Per* Buller J. in Lickbarrow *v.* Mason, 2 T. R. 75.

(*h*) Gordon *v.* Martin, Fitzg. 302.

(*i*) Waddington *v.* Oliver, 2 Bos. and Pull, N. R. 61.—and see also Mussen *v.* Price, 4 East. 147.—and Dutton *v.* Solomonson, 3 Bos. and Pull. 582.

for

for instance, an agreement on the part of a vendee to give a bill of exchange in payment of goods sold, the plaintiff should declare specially, and if he fail altogether in proving the special, he may then resort to the general *indebitatus* count; but if the plaintiff fail in the special count, on account of a variance between the agreement stated and that proved, or for any other cause which shews that there exists a special agreement which affords a ground of action to the plaintiff, he will not be allowed to recover on the general count (*k*).

It should here be observed, that in an action by several partners for goods sold, if one of them join in the action who at the time of the contract was not a partner, but who afterwards became such, and, by agreement amongst the partners, was to have a share in the profits, from a time preceding the contract, the plaintiffs will be nonsuited: for such person not being a partner at the time of the contract, there was no contract with him (*l*).

In an action for goods sold and delivered, the delivery may be proved by a journeyman of the vendor without releasing him, if it have not been customary to pay such journeyman for the goods upon the delivery; but if that have been usual, it seems that he is not a good witness without a release (*m*). So a contract between vendor and vendee may be proved by the broker who made it, and that though he be to have for himself whatever money he can procure beyond a stated sum (*n*). But a letter written by an agent or broker, by whom a contract for

(*k*) Bull, N. P. 136, 139.
(*l*) Wilsford *v.* Wood, 1 Esp. N. P. C. 182.
(*m*) Adams *v.* Davis, 3 Esp. N. P. C. 48.
(*n*) Benjamin *v.* Porteus, 2 H. Bl. 590. See Heath and Rooke, ff.

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the sale of goods has been made, is not evidence, where such agent or broker can be called as a witness (*o*).

And where an account for goods sold has been adjusted, and a bill of exchange given for the amount, it is not competent to the party giving such bill afterwards to rip up the account which has been so settled, and dispute the several items (*p*).—

Thus much for the vendor's remedy for the non-performance of the contract: we will now, on the other hand, see what remedy the law has provided for the vendee.

We may recollect that where the bargain for the sale of goods is complete, the property of the goods is in the vendee by the bargain; and therefore if, upon a sale of goods, the vendor refuse to deliver them, the vendee upon tendering the stipulated payment may maintain trover against the vendor; or, as is more usual, particularly in cases of special contracts, an action of assumpsit for the non-delivery; in which action the contract should be stated according to the fact, and performance, or readiness to perform it by the plaintiff shewn; and if the contract be to deliver goods on request, a special request must be stated (*q*): but in an action for the non-delivery of goods sold, according to the contract, it is not necessary to allege an actual tender and refusal of the price, it is sufficient to aver that the vendee was always ready and willing to receive, and pay for the goods (*r*). So where goods have been delivered, but a warranty of their goodness, &c. made on the sale, proves untrue, a special action of assumpsit on such warranty is the proper remedy (*s*), though it was formerly

(*o*) Maesters *v.* Abraham, 1 Esp. N. P. C. 375.

(*p*) Knox *v.* Whalley, 1 Esp. N. P. 159.

(*q*) Bach *v.* Owen, 5 T. R. 409.

(*r*) Waterhouse *v.* Skinner, 2 Bos. and Pull. 447.

(*s*) Stuart *v.* Wilkins, Dougl. 18.

more

more usual to declare in case (*t*); and if there be any doubt whether the vendor have a partner in the transaction, it is still *advisable* to declare in case, to avoid a plea in abatement (*u*). Where the action is brought upon an *express* warranty, the *scienter* need not be charged, or if charged, need not be proved (*x*). But it is otherwise, where there has been no express warranty, and the action is brought for the *deceit*, in selling to the plaintiff an article unsound or unmerchantable to the vendor's knowledge; for in such case the *scienter* is the gist of the action, and consequently must be stated and proved (*y*).

(*t*) Williamson *v.* Allison, 2 East 451.

(*u*) Govett *v.* Radnidge, 3 East 62.

(*x*) Williamson *v.* Allison, *supra*.

(*y*) Springwell *v.* Allen, Aleyn 91.—2 East. 448. n. S. C.

APPENDIX

APPENDIX.

The following Cases were reported after the preceding Sheets had been sent to the Press.

Porter and others v. Palsgrave, 2 Camp. N. P. C. 472.

THIS was an action for not accepting a bill of exchange for the price of goods sold by the plaintiffs to the defendant, to be paid for by a bill of exchange at six months date.—A question was made, whether the plaintiff was entitled to interest?

The counsel for the plaintiff contended, on the authority of Becher *v.* Jones (*a*), that he was entitled to interest from the time when the bill, if accepted, would have become due.

On the other side it was argued, that Becher *v.* Jones was in the Exchequer Chamber, where a different rule prevails, and the case of Gordon *v.* Swan (*b*) was relied on.

LORD ELLENBOROUGH.—There the purchaser had not stipulated to pay by a bill of exchange, which makes all the difference. If there is merely a day named when payment is to be made in cash, this is a provision that payment shall not be demanded earlier, and it afterwards becomes the common case of goods sold and delivered. But if the agreement is to pay by bill at a given date, this amounts to a promise to pay interest upon the price of the goods from the day when the period expires for which the bill would have to run. Had the bill in this

(*a*) *Ante* p. 71. (*b*) *Ante* p. 70.

case

case been accepted, interest would clearly have been recoverable upon it, and the defendant cannot be allowed to profit by his own wrong.—Verdict accordingly.

Boyce and another v. Warburton 2 Campb. N. P. C. 480.

So also in an action for not accepting a quantity of deals purchased by the defendant of the plaintiff, to be paid for by a bill at four months, interest having been allowed, at the trial, on the amount of the stipulated price from the time the bill, if given, would have become due; it was moved to set aside the verdict on that ground, or to reduce the damages to the amount of the price of the deals; and it was argued, that if interest could be allowed where there was no promise to pay it, nor any written security, still that this was different from the case of refusing to pay for goods after accepting them, as the vendor had still the goods in his hands, and the purchaser could not be supposed to have made any profit by them. But—

The court said, that in either way the vendor was deprived of the use of money to which he was entitled on a certain day; and that as interest would have been allowed had the bill been given but not paid, it would be unjust and absurd to withold interest where the purchaser had from the beginning broken every part of his contract.—Rule to shew cause refused.

Everett v. Collins, 2 Camp. N. P. C. 515.

Money had and received to recover the sum of £170. The case was, that the plaintiff had employed the defendant, who was a salesman in Smithfield market, to sell some cattle for him, and on the 15th of June his son went to receive the money. The defendant carried the young man with him to Mingay, Nott, and Co. who acted as book-keepers and sub-agents for him and a number of other salesmen, and desired them to make out the plaintiffs

tiff's account. The account shewed that the sum of £171 5*s.* 6*d.* was due to the plaintiff. Mingay, Nott and Co. then offered to pay the plaintiff's son in Bank of England notes, but he said a cheque would suit him better for the £170. Accordingly they paid him £1 5*s.* 6*d.* in cash, and gave him a cheque for £170 upon Smith, Payne and Smith, bankers in the city. The cheque was carried immediately to the bankers and dishonoured. Various other cheques of Mingay, Nott and Co. were dishonoured the same day, as they had greatly overdrawn their account; but they continued to pay at their counter till four o'clock, when they finally stopped, with a balance of the defendant's in their hands, larger than the sum in question. The question was, if the defendant were discharged by this payment?

Lord Ellenborough.—In the ordinary case, if a creditor prefer a bill of exchange accepted by a stranger to ready money from his debtor, he must abide the hazard of the security he takes. But Mingay, Nott and Co. are not to be considered in the light of third persons, but as the defendant's servants. When they offered to pay by notes or *their* cheque, that was tantamount to an offer to pay by notes or *his* cheque. The cheque must be looked upon as his; and there is no pretence for saying that a debtor is discharged by giving a cheque which produces nothing, although payment in cash may have been previously tendered.

In this case the principle of the case of Arden *v.* Sharpe(*c*) was recognized; that if a partner draw or indorse a bill in the partnership firm, it will *primâ facie* bind the firm, although passed by the one partner for his

Ridley *v.* Taylor, 13 East. 175.

(*c*) *Ante*, 112.

separate

separate use, unless there be evidence of covin between such separate partner and the person receiving the bill, or knowledge of the fact, that the bill was applied to the separate use of one partner.

Ingram v. Lea, 2 Camp. N. P. C. 521.

In an action for not delivering goods made by the defendant for the plaintiff in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties, may be read in evidence without a stamp.

If goods in the city of London are sold by a broker, to be paid for by a bill of exchange, the vendor has a right, *within a reasonable time*, if he be not satisfied with the sufficiency of the purchaser to annul the contract, provided he intimate his dissent as soon as he has an opportunity of inquiring into the solvency of the purchaser.

Hodgson v. Davies, 2 Camp. N. P. C. 530.

This was an action for not delivering a quantity of tobacco sold by the defendant to the plaintiff, through the medium of a broker, to be paid for by a bill at a certain date.

The defence principally relied on was, that the defendant had not ratified the contract entered into by the broker. The fact was, that the broker having the usual authority from both parties, wrote out the bought and sold note, and sent a copy to each of them. The defendant made no objection till five days after, when he was called upon to deliver the tobacco. He then said he did not approve of the sufficiency of the plaintiff, and refused to perform the contract.—The counsel for the defendant contended, that the person who sells goods by a broker, reserves to himself the power of ratifying or rejecting the contract, as he shall be satisfied with the credit

credit of the purchaser;—and offered to prove that such is the usage of trade in the city of London.

Lord Ellenforough was at first rather inclined to think, that the contract concluded by a broker must be absolute, unless his authority were limited by writing, of which the purchaser had notice. But—

The gentlemen of the special jury said, that *unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract.*

Lord Ellenborough allowed that this usage was reasonable and valid. But he clearly thought that the rejection must be intimated as soon as the seller has had time to inquire into the solvency of the purchaser. Five days seemed to him a longer period than the exigency of commerce would permit. However, he left it to the jury to say, whether it was according to usual commercial practice, to reject a contract so long after it had been entered into. The jury found for the plaintiff.

It was also ruled in this case, that if it be stated generally in the bought and sold note, that the goods are to be paid for "*by bill,*" evidence cannot be received to shew, that by *bill* is meant *an approved bill:* and *semble* that an approved bill is a bill to which there is no reasonable objection, and that ought to be approved; and that the vendor has no arbitrary power to approve or disapprove according to his interest or caprice.

The

The following note will tend to illustrate the doctrine of *express* warranties by servants, acted upon in the case of *Helyear v. Hawke. Ante* p. 124, upon which some doubt might perhaps attach from the loose dictum cited from Rolle in note to p. 125.

Alexander v. Gibson 2 Camp. N. P. C. 555.

Action on the warranty of a horse, which had been sold at East Grinstead fair by the defendant's servant to the plaintiff, *warranted sound.*—It was insisted that the plaintiff should begin by proving the servant's authority to warrant. But—

Lord Ellenborough said, "If the servant was authorized to sell the horse, and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual on the sale of horses, to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business with which he is entrusted in the common and usual manner. I am of opinion, therefore, that *if the defendant's servant warranted this horse to be sound the defendant is bound by the warranty.*"

If after a dissolution of partnership, and notice of it published in the London Gazette, and sent round to the persons dealing with the house, one of the partners carry on trade under the old firm, and draw and accept bills in that firm, the other partners are not liable upon such bills even to a person ignorant of the dissolution of partnership.

Newsome v. Coles and others, 2 Camp. N. P. C. 617.

This was an action against the defendants as acceptors of a bill of exchange drawn upon "*Thomas Coles and Sons,*" and accepted in that firm.

Thomas

Thomas Coles and his three sons, the defendants, formerly carried on business in partnership under the firm of "*Thomas Coles and Sons.*" The father died in 1805, and the three sons continued to carry on business under the same firm till the year 1808. *George* and *Charles* then withdrew, and established a new business under a new firm. Notice of the dissolution of partnership was published in the London Gazette, and was sent round to the correspondents of the house. *William Coles* continued the old business by himself, *under the old firm*, and accepted the bill in question. The plaintiff had not had any dealings with the partnership of Thomas Coles and Sons, when composed of the three brothers; and when he took the bill, he did not know that the partnership had been dissolved.

It was contended that *George* and *Charles Coles* were liable as partners with their brother *William*. That they must be taken to have authorized him still to hold them out as partners to the world: for if they consented to the old firm being used by him, they were liable as much as if the names of both had been mentioned by their authority, and their consent must be presumed from their never having attempted to prevent him from using the old firm.—And that they should have applied to the great seal for an injunction.

Lord Ellenborough,—"It is not pretended that the "defendants *George* and *Charles* ever interfered with "the business carried on by *William* after the dissolu- "tion of the partnership, or by any act whatever autho- "rized him to use the firm under which they had traded "together. I am therefore of opinion that they are "not liable for that firm being used by him without "their authority. Ample notice had been given of the "dissolution of the partnership; and after that it was "the

" the duty of persons taking securities in the name of " *Thomas Coles and Sons*, to enquire who were de- " signated by that firm. The plaintiff might not know " of the dissolution, but he had the means of knowing, " and the partners who retired could not remain liable " for his ignorance. I think they were not bound to " apply to the Lord Chancellor for an injunction, or to " take any notice of the firm which their brother might " happen to use. They were discharged from all liability " for his acts by the dissolution of the partnership, and " the notice which was communicated of that event. " The plaintiff must be called."

King *v.* Meredith, 2 Camp. N. P. C. 639.

In an action for the price of a quantity of brandy and rum, the defence set up was, that the spirits were delivered by the plaintiffs to a carrier, to be conveyed to the defendant. They were then of legal proof; but they were under proof when delivered by the carrier to the defendant, and were for that reason seized and condemned by the excise. *The carrier was to be paid by the plaintiffs*, and it was therefore contended, on the part of the defendant, that the spirits were at the risk of the plaintiffs while in the hands of the carrier, who being paid by them, must be considered as their agent: but—

LAWRENCE, J. said, that the mode in which the carrier was to be paid made no difference. The moment the spirits were delivered to him, the property vested in the defendant. The plaintiffs by paying the carrier did not become insurers of the spirits while in his hands.—The plaintiffs had a verdict.

The King *v.* DeYonge K. B T. T. 1811, 2d. July.

In this case, which was alluded to in a note to page 266, the defendant had been indicted on the stat. 5 and 6 Edw.

6 Edw. VI. c. 19. for purchasing fifty two guineas at the rate, *in Bank of England notes*, of 22*s.* 6*d. per* guinea, of which he was convicted: but on a motion in arrest of judgment, a question was raised, whether the facts proved amounted to an offence within the statute (*g*)? This point was reserved for the opinion of the twelve judges. Accordingly the case was fully argued before them on several days; and, on this day, Lord Ellenborough delivered the opinion of himself and eight other judges, who had heard the argument that the defendant had not been guilty of any offence within the meaning of the act; and the judgment was accordingly arrested.

Note, Three of the judges were not present on the former days of argument, and therefore the court had no opportunity of knowing their opinions, but there was no reason to suppose that they dissented from the opinion of the other judges.

(*f*) See the stat. *ante* 266.

A GENERAL

A

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